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RECORD, CASE NO. 14916.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., ~~972.~~ 668

THE UNITED STATES, PLAINTIFF,

vs.

MICHEL THOMAS.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 28, 1891.

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INDEX.

	Original.	Print.
Caption	1	1
Indictment	2	1
Order to transfer cause to circuit court	4	2
Arraignment and plea	5	2
Verdict	6	3
Motion for sentence	6	3
Motion for new trial	7	3
Evidence	8	3
Testimony of ——— Patrick	8	3
Charles M. Foresman	19	10
T. L. Hacker	29	16
Charles M. Foresman (recalled)	33	18
Alex. Corbine (recalled)	34	18
O mis Que We Ge Zek	38	21
Stipulation as to facts	41	22
Order certifying cause to Supreme Court of the United States	51	27
Opinion of Judge Gresham	53	28
Opinion of Judge Bunn	57	30
Clerk's certificate	67	35

1 IN CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

At the term of said court held on the first Tuesday of December, 1890, to wit, on the 6th day of January, A. D. 1891.

Present and presiding, Honorable Walter Q. Gresham, circuit judge, and Honorable Romanzo Bunn, district judge.

UNITED STATES OF AMERICA
vs.
MICHEL THOMAS. } Indictment.

Transcript of record.

Be it remembered that on the 23d day of September, A. D. 1890, the grand jury came into court and presented the following true bill of indictment against the above-named defendant, Michel Thomas, for murder.

2 DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE WESTERN DISTRICT OF WISCONSIN.

At the September term of the district court of the United States of America for the western district of Wisconsin, begun and held at the city of La Crosse, within and for the district aforesaid, on the 16th day of September, in the year of our Lord one thousand eight hundred and ninety.

WESTERN DISTRICT OF WISCONSIN, *ss:*

The grand jurors of the United States of America within and for the district aforesaid, upon their oath, present that Michel Thomas, late of the county of Sawyer, in said western district of Wisconsin, heretofore, to wit, on the second day of August, in the year of our Lord one thousand eight hundred and ninety, at the county of Sawyer, and within said western district of Wisconsin, did, within the limits of an Indian reservation, to wit, the Lac Court d'Oreilles Indian Reservation, with force and arms, in and upon one David Corbine, then and there being, feloniously, wilfully, and of his malice aforethought, make an assault, and that he, the said Michel Thomas, with a deadly weapon, to wit, a certain pocket-knife with a sharp blade, which said knife, he the said Michel Thomas, in his right hand then and there had and held, the said David Corbine, in and upon the left side of the breast, near the heart, of him, the said David Corbine, then and there, feloniously, wilfully, and of his malice aforethought, did strick, stab, cut, and thrust, giving to him, the said David Corbine, then and there, with the knife aforesaid, in and upon the aforesaid left breast, near the heart, of him, the said David Corbine, one mortal wound of the breadth of one inch and of the depth of three
3 inches, of which said mortal wound the said David Corbine then and there died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Michel Thomas, him, the said David Corbine, in the manner and by the means aforesaid, then and there, feloniously, wilfully, and of his malice aforethought, did kill and murder, both he, the said Michel Thomas, and him, the said David Corbine, being then and

there Indians of the Chippewa tribe of Indians, and under the superintendence and control then and there of an Indian agent of the United States of America; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Second count.

And the grand jurors aforesaid, upon their oath aforesaid, do further find and present that said Michel Thomas, late of the county of Sawyer, in the western district of Wisconsin, heretofore, to wit, on the second day of August, in the year of our Lord one thousand eight hundred and ninety, at the county of Sawyer, in the western district of Wisconsin, and within the limits of an Indian reservation, to wit, the Lac Court d'Oreilles Indian Reservation, with force and arms, did wilfully, feloniously, and of his malice aforethought kill and murder one David Corbine, both he, the said Michel Thomas, and him, the said David Corbine, being then and there Indians of the Chippewa tribe of Indians and under the superintendence and control then and there of an Indian agent of the United States of America; contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States of America.

SAMUEL A. HARPER,
United States Attorney.

(Endorsed:) A true bill.

HARVEY E. HUBBARD,
Foreman.

4 And now, on the same day, to wit, on the 23 day of September, in the September term, A. D. 1890, of said court, in the record of proceedings thereof, before the Hon. Romanzo Bunn, judge, is the following entry:

UNITED STATES OF AMERICA
vs.
MICHEL THOMAS. } Indictment.

And now comes Samuel A. Harper, district attorney, and John J. Fruit, asst. U. S. attorney, who prosecutes for the United States in this behalf and moves the court to have said cause transferred from the United States district court to the United States circuit court, as provided by the statute. It was thereupon ordered that this cause be transferred to the circuit court U. S. and entered upon the records thereof, to be hereafter proceeded in in that court as provided by law.

5 Afterwards, to wit, at the December term, A. D. 1890, in the record of proceedings thereof, before the Honorable Romanzo Bunn, judge, is the following entry:

UNITED STATES OF AMERICA
vs.
MICHEL THOMAS. } Indictment.

And now comes the U. S. attorney and the defendant, Michel Thomas, being in court with his counsel. On motion of the U. S. attorney, the

said defendant is duly arraigned by reading to him the said indictment and asking him whether he pleads guilty or not guilty, in manner and form as charged therein, and the said defendant says that he pleads not guilty to the charge contained in the said indictment, and of this he puts himself upon the country, replication, &c., issue, &c.

6 Afterwards, to wit, on the 16th day of December, in the December term, A. D. 1890, of said court, in the record of the proceedings thereof, before the Honorable Romanzo Bunn, judge, is the following entry:

UNITED STATES OF AMERICA
vs.
MICHEL THOMAS. } Indictment.

And now comes the United States, by Samuel A. Harper, U. S. att'y, and John J. Fruit, asst. U. S. attorney, and the defendant, being in court, with his counsel, Hollon Richardson and Rogers & Hall, and this cause came on to be tried by the court and a jury, duly empanneled, tried, sworn, and charged. And the jurors of the jury, upon their oath, do say that they find the defendant guilty in manner and form as charged in said indictment.

And comes the district attorney and prays judgment that the said Michel Thomas may be duly sentenced and adjudged to suffer the penalty of the law.

And comes the defendant and enters his motion for new trial, &c., in writing, as follows:

7 UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF WISCONSIN.

THE UNITED STATES OF AMERICA
vs.
MICHEL THOMAS.

And now comes the defendant, at the same term of the trial and after verdict and before sentence herein, and moves the court upon the minutes of the court, and upon the records herein, to set aside the verdict herein and grant a new trial for the reason:

First. That the court has not jurisdiction to try the defendant, for the alleged crime was not committed on an Indian reservation.

Second. That said verdict, sentence, and judgment is contrary to the law and the evidence in the case.

Third. For manifest errors in the charge of the court and for other reasons apparent in the record.

HOLLON RICHARDSON and
F. W. HALL,
Defendant's Att'ys.

8 Court opened 10:20 a. m., Wednesday, Dec. 17th, 1890.

A map of the State produced from the Land Office and shown to the jurors.

Mr. PATRICK called and sworn to explain the map to the jurors.

Direct examination by Gen. RICHARDSON:

Q. Can you state in what town, range, and section Hayward is located?

A. Yes; it is town 41, range 9, section 28.

Q. Do you know where Phalen's place is located?

A. Very nearly; I don't exactly remember; I think it is 28, 41, 8.

Q. Now, does the highway run from Hayward through to Phalen's?

A. Yes, sir.

Q. You have marked the line? Does that line represent nearly the general course of the road to Hayward?

A. Yes, very nearly; it might not be exactly.

Q. Now, take from Phalen's; will you give me the general course from Phalen's to Hayward?

A. It is about due west.

Q. I am speaking of the direction from Hayward to Phalen's.

A. It is due east.

Q. Now, you have also marked a line upon this map in pencil from Phalen's around to the Government trail?

A. Yes; years ago, before Hayward was there, I located that corner here between 26 and 27, 34 and 35.

Q. You located that?

A. Yes, I located that corner. I located the town line all through here.

Q. Then, now I will ask you, you had this line marked in ink—this dotted line indicates the general line of the highway?

A. Yes, very near it; very near it.

9 Q. Where is Round Lake situated? Is that Round Lake [pointing on the map]?

A. Yes, on section 2 and section 1.

Q. I will mark Round Lake, R. L. The Indian village is here?

A. I don't just remember the fractional towns on section 1 and 2. All right around, including Round Lake, around here on 1 and 2.

Q. I will call this the Indian village?

A. Yes; there are a few houses there, marked Indian houses. On section 35 over here is a sawmill, a portable sawmill.

Q. This is the boundary line over here?

A. Yes, sir.

Q. Now, where is the north boundary line of the reservation? What is it called?

A. It is called the town line between 40 and 41.

Q. Then the reservation extends up to the north line of town 40?

A. Yes, to 40.

Q. Now, I will mark the cut-off. Now, pursuing this highway down through section 16 in town 40, range 8, on the reservation, where does the highway pass in section 16?

A. It passes about twenty rods west of the southeast corner and passes through the south line of section 16 about twenty-three rods, I should judge, from the corner, to where the road crosses.

Q. West of the southeast corner?

A. Yes, on the south line of section 16.

Q. How far north of the southeast corner does the highway on section 16 pass?

A. I should judge it was about thirty rods.

Q. That is to say, it comes out about thirty rods?

A. Above the corner. It crosses the east line about thirty rods from the south line; from thirty to forty rods, somewhere near there.

Q. Now, where does it come out of section 16 on the west—on the south line?

10 A. It comes out about twenty-three rods, I should think, west of the corner of section 16, the southeast of the southeast, the southeast corner.

Q. How far north?

A. I should think about thirty rods.

Q. About twenty-three rods west?

A. Yes.

COURT. How long is the road?

A. I should think, across the corner—

Q. Is the whole of that highway that you speak of, between the points twenty three and thirty rods, is it wholly in section 16?

A. Yes, sir.

Q. Do you know the place or point where what is known as—in coming from Hayward where do you leave the main road?

A. You leave the main road on section 28, at Phaelen's.

Q. Then it goes in what direction?

A. It runs a trifle southeast.

Q. Through what sections does it pass?

A. It passes through sections 33 and 34.

Q. Through what town?

A. Section 40 in 40, range 8, and section 33 in 41, 8.

Q. Now, does it pass through any other section?

A. It passes through 9 or 10.

Q. It passes through 10?

A. Yes, I think that is the section.

Q. This is 9, is it [pointing on map]?

A. Yes. It is the section immediately south of 4. It comes in at section 16 about twenty rods east of the quarter post on the north line and runs angling southeast across the section.

Q. Now, I have drawn a line across section 16.

A. Yes, sir.

Q. Does that line represent the general direction of the road?

A. Yes, to my knowledge, that is about the direction the roads lay.

Q. Now, does this cut-off enter into the main highway wholly on section 16?

A. Yes, sir.

11 Q. How far inside of section 16?

A. I should judge it would be all the way from six to eight rods from the south line of section 16.

Q. I would say that the short cut met the Hayward road about eight rods north.

A. From the south line of section 16; I would say from six to eight rods, some where along there.

Q. Is it east or west of the east section line?

A. West of the east section line.

Q. How much?

A. I should judge about twenty-one or twenty-two rods, the way the road runs.

Q. This representation is not correct, then?

A. As I have drawn it on the map it would be close to thirty rods.

Q. Now, where is the Court O'Reilles Reservation, the village of Court O'Reilles?

A. You mean the village?

Q. Yes.

A. It is in 39, 8, in section 8. I think it is on the northeast quarter of the southeast quarter of 8.

Q. Suppose I use this as an additional map, can you tell us about where it would be?

A. Yes; it would be on section 8.

Q. If you mark right along this margin ——

A. It lies farther down, a few miles below that.

Q. Let me ask a further question. The confluence or uniting of these two roads, what is known as the short cut and this road through from Hayward to the reservation, that is wholly on the section?

A. Yes, sir.

12 Q. Wholly inside of the section?

A. Yes; the forks of the road are wholly in section 16; six to eight rods north of the south line.

Q. How far is it from Hayward to Phaelen's where the short cut forks off from the Round Lake road?

A. I should judge about six miles.

Q. From Hayward?

A. Yes; to Phaelen's.

Q. What direction is it from Hayward to Phaelen's?

A. Very nearly east.

Q. How far is it from Phaelen's to Round Lake village?

A. About three miles.

Q. What direction is that?

A. It is a trifle south of east.

Q. How far from Round Lake Village to Court O'Reilles village?

A. About eight miles.

Q. What direction is that?

A. South-southwest; a trifle west of south.

Q. You say the short cut forks off at Phaelen's?

A. Yes, sir.

Q. What direction is it from there to where the roads join?

A. A trifle east of south.

Q. How long is that short cut?

A. Before you come into the road again?

Q. Yes.

A. I should judge about four or five miles; five miles.

Q. How much shorter is it than around by the Round Lake road?

A. I should judge about two miles shorter.

Q. How far from the nearest limit of the reservation is the point of meeting of the short cut with the Round Lake road nearest to the village of Court O'Reilles?

13 A. The boundary nearest to Court O'Reilles would not be the nearest to the Court O'Reilles Reservation.

Q. What is the nearest boundary to the limit of the reservation?

A. Section 16 is one limit, and there is another limit nearly on the line between 40 and 41.

COURT. The section is wholly within the limits?

A. Yes, sir.

Q. How far is section 16 to the nearest line?

A. About three miles north.

Q. How large is the reservation?

A. It contains about three townships, but I think it is in fractional parts.

COURT. It contains about three townships?

A. Yes, sir.

Q. Does any boundary line of the three correspond to the outside limits of the reservation?

A. Yes; this north line.

Q. How many school sections are there in the reservation?

A. Two, I think.

Q. Isn't there one for each township?

A. There are not inside of the reservation.

COURT. There are only two sections 16 within the reservation?

A. I think that is all within the limits of the reservation. It takes in a part of 40, range 7, and 40, range 6, and 38, first and 39 first with the exception of 2, and it takes in another town of 40, range 8, with the exception of section 1, 40, swamp lands, I think.

Q. The 16th section lies inside of the reservation?

A. Yes; inside of the reservation.

COURT. You heard the testimony of the witnesses?

A. I heard a little of it.

COURT. You understood it as to the location of this trouble?

A. Yes, sir; I got that.

14 COURT. And you understood that is on section 16?

A. Yes, sir; according to the testimony.

COURT (to counsel for defendant). You propose to make a point on that?

Mr. RICHARDSON. Oh, certainly.

COURT (to defense). You may raise the point as soon as possible.

COURT (to prosecution). Do you concede it is on section 16?

Mr. HARPER. The testimony of witness seems to make it so.

COURT. Have you anybody to testify it is not on section 16?

A. No, sir.

COURT. We may just as well settle this question now.

TESTIMONY RESUMED.

Q. Is town 40—what range did you say this was?

A. 8.

Q. Is town 40, range 8, wholly within the reservation?

A. Town 40, range 8?

Q. Yes.

A. Yes; I think it is, with the exception of the lakes, they cut out a good deal of it.

Q. And this school section 16 is two miles from the north limit?

A. Yes, sir.
Q. So this is two miles within the outside limits of the reservation?
A. Yes, sir.
Q. It is two miles likewise east of the western limit of the reservation?
A. Yes; it is nearly in the center of the town.
Q. It is three miles west of the eastern limit?
A. Yes, sir.
Q. And more than three miles north of the southern limit of the reservation?
A. Yes.
Q. Sections 8, 9, 10, 15, 17, 20, 21, and 22 are all reservation lands?
A. Yes, I think—do you mean in town 40, range 8?
Q. Yes.
A. Yes, sir.
15 COURT. Are you a surveyor?
A. Not a practical surveyor; I have followed the woods for twenty years.
Q. You know these lands?
A. Yes, sir.
Q. You live on the reservation?
A. Yes; inside of the reservation in 39, section 18, southeast quarter of the northeast quarter.
Q. How long have you lived there?
A. Steady for twenty years and off and on for eight years.
Q. Got any land there?
A. No, sir; only I live on a swamp quarter in 39, 8.
Q. The swamp lands there are known as the swamp reservation?
A. Yes, sir.
Q. And they consist of all pieces off land, large or small, which come under that designation with reference to character?
A. Yes, these are marked on the plats.
Q. So, if there is forty which would or did have sufficient low land in it to be classified as swamp, it would be correctly be called swamp land?
A. Yes.
Q. And make a part of the swamp reservation?
A. Yes.
Q. Are there a number of these swamp reservations?
A. Oh, yes; a good many of them, in 39, 7, 4 or 5 in 39, 8, only one in 49. When the Government survey was out, ten or eleven years ago, he run up to the 16 stake, then west and to the 16 stake, and then north, showing the boundary line was near that 16 stake.
Q. They were sections here and there?
A. Yes.
Q. And belong to the State of Wisconsin and parties who have bought?
A. Yes, as I understand it, they belong to the State.
Q. You bought yours of the State?
A. No; I haven't bought it; I just squatted on it.
Q. You have a right to hold it?
A. Yes.
16 Q. And purchase it when you have a way to do so?
A. Yes, sir; I have been told that if I staid there I would get it if I wanted it.

Q. And there are still swamp forties up there owned by private individuals?

A. Yes, I think there are; I think Mr. —— owns some.

COURT. You have run this line since this thing occurred?

A. No, sir.

COURT. Did you run this line with this idea in your mind, as determining whether this place was on section 16?

A. No, sir.

COURT. What makes you remember that this particular place is on section 16?

A. Mr. Corbine's testimony shows me that it is.

COURT. But how do you come to remember?

A. Because I can see the corner of the road.

COURT. You have not been there since this alleged murder was committed?

A. I have passed there; what makes me remember we have got a stake stuck.

Mr. FRUIT. What was it stuck there for?

A. It was done in case any one wanted to find the corner. He put it there as a guide. It is twenty rods east of this stake.

Q. It is not where it was liable to be burned?

A. No, sir; it is right by the road.

COURT. If this case should go to the State court, you would not think it could turn out that this place could be on any other section?

17 Q. Are you absolutely positive about this corner post?

A. I am positive about that, for I have run up to it from the corner post of other sections.

Q. If this homicide were committed not further than fifty feet from the intersection of these two roads, would it be on section 16?

A. Why, yes; I think so.

COURT. Did Corbine tell you where the thing was done?

A. No, sir; Mr. Morgan sent his son down to my house—I wasn't subpœnaed—to get me to come to Madison; Mr. Corbine came up near another man, and I asked him to ask Mr. Corbine where it was done, and he went on to state where it was done.

COURT. Who was it told you that?

A. Mr. Corbine. You took his testimony yesterday.

COURT. That would be how far?

A. That would be, say, from four to eight rods.

Q. You are quite sure it would be on section 16?

A. Yes, sir; I am pretty positive, for the line has been blazed out.

COURT. You have been there since this thing took place?

A. Yes, sir; several times.

Q. Have you noticed that stake?

A. Yes, sir; I have noticed it every time.

Q. Is it a Government stake?

A. No, sir; but I have been to the corner. Anybody going there either likes to pick out a boundary line or corner. They are getting more or less burned and troublesome to find.

Q. Did you run this line recently?

A. No, sir; about four years ago.

Q. Did you set up any stakes there now?

A. No, sir, I did not, for when I run that line the corner was very plain, but now it is gone; it is burned so that you couldn't read it at all.

18 Q. When you run the section line four or five years ago, how much surveying did you do there?

A. I didn't do anything off that section at all.

Q. Are there lines or trees and posts there now, that you recognized as having noticed then?

A. Yes, the section corner; I have been to that section corner since then.

Q. When you were looking for Government lands?

A. Yes; on section 16.

Q. When you started to run that line, where did you begin?

A. I began on section 16; I was running 15.

Q. Where did you find section 15?

A. I found it on an open spot.

Q. From what data or memoranda?

A. I came up from the quarter post south of the line.

Q. The timber has been cut off that section, has it not?

A. Yes, sir.

Q. How far has the timber been cut to the section line?

A. All around it, on both sides.

Q. Is the timber cut from the adjoining, the school section?

A. Yes, sir.

Q. So that there is no line there by which you can distinguish the section?

A. Yes; there is now and then places on the open where there are poplars and birch trees.

Q. Can you describe the reservation, taking it as a whole, as to the sections it occupies; can you name all the sections in it?

A. I believe if you gave me time I could. Well, no, I don't know as I could; it is cut up in so many parts; I haven't got it in my head how it all lies.

Q. Do you know the townships the reservation includes?

19 A. Seven, I think; but it is about three full townships.

Q. In area?

A. Yes, sir.

Q. What is taken away from the area of the seven townships, as they are outlined, would leave about one?

A. They have taken but very little in different towns; along 40, range 6, there they appeared to want the river; they have taken 40 right along the river; it looks like a pair of stairs right by the river.

Q. They have taken out the lakes and the swamp?

A. Yes, the lakes and the swamp.

Q. Has section 16 been sold to the State by private sale?

A. That I only know by hearsay.

Q. Do you know whether it has been regularly filed by private parties?

A. Yes, I think so.

Q. Who did it?

A. I think Mr. Gainor (or Gurnoe) did it.
Q. How long ago?
A. I think two or three years this winter.
Argument on the question of jurisdiction.
Court adjourned until 2.30 p. m.; opened, 2.45 p. m.

Mr. CHARLES M. FORESMAN called and sworn.

Direct examination by HARPER:

Q. Your name is Charles?
A. Yes, sir.
Q. Where do you live?
A. Madison, Wisconsin.
Q. What is your business?
A. Bookkeeper of the State land office.
Q. Of this State?
A. Of the State of Wisconsin.
Q. How long have you been in the State land office as an employé?
A. I have been about twenty-nine years and six months, I think.
Q. Are you familiar with the records of the office?
A. Yes, sir.
Q. You may state whether or not, among the records of the land office and in the custody of that office, this paper belongs. (Paper handed to witness.)

20 A. This is a list of the land selected by the headsmen of the Indians and sent to our office containing the entire list of the reservation.

Mr. HARPER (taking paper). This is a document bearing date of execution, 22nd day of June, 1859, purporting to be signed and sealed by various persons of Indian names as chiefs or bandsmen, and by one Matthias Martin, as special agent of the United States, witnessed by three witnesses, headed "Lands selected by the La Court Oreilles band of the Chippewas of Lake Superior, at La Court Oreilles, Wisconsin, on the 22nd day of June, A. D. 1859, in compliance with the third clause of article second of the charter made at La Pointe on the 30th day of September, A. D. 1854, between David B. Herriman and Henry C. Gilbert, commissioners on the part of the United States, and the Chippewa Indians of Lake Superior and by their chiefs and headmen, said selections of land made by the chiefs of La Court Oreilles band of the Chippewas of Lake Superior and Mathias Martin, special agent of the United States at La Court Oreilles, Wisconsin, on this 22nd day of June, A. D. 1859."

Description of the lands is as follows: Town 40, range 8 (presumed to be west), sections as follows: One, two, three, four, five, sections successively one to thirty-six, inclusive (section 16 of said town 40, range 8, being included with the others. Section 16 also included when it occurs serially in numbering the sections in all other towns).

COURT. Does that state how much there is in the aggregate?

A. The aggregate is 69,114.29 acres.

Mr. RICHARDSON. That is not a part of the original document?

A. Yes, it is.

21 Mr. HARPER. This has a note, unconnected, at one place, which shows an area that would add about 100 acres to the aggregate given

there. I will read this also. After description of lands selected is the following: "We, the undersigned chiefs and headmen of La Court Oreilles band of the Chippewa Indians of Lake Superior, do hereby select and acknowledge the within described lands as being made by us at La Court Oreilles, Wisconsin, in compliance with the third clause of article second of the charter made at La Pointe on the 30th day of September, A. D. 1854, and do also hereby agree to use all our authority and influence to induce our people to abandon the lands sold or ceded to the United States by us and by our advice, and to reside with us on the lands selected by us and described within our reservation and homes. In testimony whereof, we, the chiefs and headmen of said band, have hereunto set our hands and seals at the place aforesaid the 22nd day of June, A. D. 1859." Signed and sealed by sixteen persons of Indian names, representing these to be principal to be chiefs and headmen and by Matthias Martin, special agent United States. In presence of Alexander Corbine, A. B. Reed, E. F. Mixer. O'Keel Cadotte, interpreter.

COURT. Is this one of the records of your office?

A. Yes, sir.

COURT. What is that?

A. It is La Court Oreilles Indian Reservation.

Q. HARPER. What is the document you have in your hand?

A. A plat of La Court Oreilles Indian Reservation, the section plat.

Q. Has it any date upon it?

A. The only date are the dates of the lands withdrawn from sale by letter to the register and receiver of the local land office.

22 Q. What title, if any, is given to the foot of this instrument?

A. La Court Oreilles Indian lands.

Q. That is printed upon the sheet?

A. Printed upon the margin of the sheet.

Q. In the right hand lower corner?

A. Is written: "Lands ordered withdrawn from sale by letter of General Land Office to register and receiver, November 22nd, 1880, 69,373.82 acres."

Q. And the lands so designated are marked pink?

A. They are marked pink.

Q. Next note?

A. "Lands ordered withdrawn from sale by letter of General Land Office to register and receiver, April 4th, 1865, 13,162.13 acres;" these designated by the color yellow. Swamp lands settled before the lands were withdrawn, 1,501.20 acres, designated by brown color.

Q. Do you know when that map was made?

A. I do not know when that map was made.

Q. Does your official letterbook, one taken from the files of the office there, show that a letter was written inquiring about these lands?

A. Here is a letter written February 1st, 1872, by T. W. Gibbs, our chief clerk, to the Hon. J. Allen Barber, Washington, D. C.: "Dear Sir: I am in receipt of your letter of the 25th ult., relative to lands in the Wisconsin reserves. Thanking you for your promptness in replying to my letter, I desire to ask another favor of you, to wit, to procure from the General Land Office perfect descriptions by townships, parts of townships, and sections, as the case may be, of all lands in this State embraced

within the limits of platted Indian reservations. The State has
23 already sold some of the reservation lands and, to avoid all complications hereafter, we want the boundaries of the Indian territory in the State positively defined, as claimed by the Secretary of the Interior. Yours very truly, T. W. Gibbs, chief clerk." On receipt of that letter, we received the following: "Washington, D. C., March 27th, 1872. T. W. Gibbs, esq., office of Commissioners of Stock and University Lands, Madison, Wis. Sir: Your letter of the 1st ult., addressed to the Hon. J. Allen Barber, has been referred to this office, and in reply to your request I transmit herewith plats of the following Indian reservations in Wisconsin: First, Lac Flambeau Indian Reservation selected by legal subdivisions, June 27th, 1866, compiled from the official records and containing an area of 67,263.52 acres, including surface of meandered lakes. Second, map of Oneida Reservation, containing 65,400 acres. Third, map of La Court Oreilles Indian lands, accompanied with a full description of the same by township, range, and section, etc. Fourth, document showing 18 sections of the Stockbridge Reservation. Fifth, document showing the Menominee and Stockbridge Indian Reservation. Sixth, document of La Pointe and Red Cliff Indian Reservations. You will please acknowledge the receipt thereof. Very respectfully, your obedient servant, Willis Drumm."

COURT. Is this plat one of the plats received?

A. Yes, sir; that is a plat of the Court Oreilles Reservation.

Q. Harper, were you able to find any detailed description accompanying this map of La Court Oreilles Reservation?

A. Yes; we have a description of the lands contained in this document.

24 Mr. RICHARDSON. Was that accompanied by the maps?

A. Yes; this description accompanied the maps.

Gen. RICHARDSON. And the letter which you have read?

A. Yes, sir.

Q. These lists making up an instrument and signed by the chiefs and this Matthias Martin is the one you refer to?

A. Yes, sir.

Q. This accompanied that chart?

A. Yes, sir.

COURT. How many school sections are included in that plat of the Court Oreilles Reservation?

A. The 16th section of Township 39, 7 west, and 39, 8 west, lots 1, 2, and 3 of 16 section of 40, 6 west.

COURT. These are fractional pieces, are they?

A. Yes, sir.

COURT. Bordering on a meandered lake?

A. Yes, sir; also the southwest, southwest of that same section; that is, 16, 40, 6, west.

COURT. Are these two sections and this fractional part of a section part of the lands in the reservation on that map?

A. As identified by the color.

Q. Also by the agreement signed by the commissioners referred to?

A. Also by the agreement in this list.

COURT. You understand the title of these lands to be in the State at that time, 1860?

A. Yes; in 1860 they were.

Q. Do you know whether they had been surveyed at that time?

A. There is another 16 section, Town 40, range 8 west; I believe that is all of the 16 sections.

Q. Is there any 16 section excluded anywhere from the body of the reservation?

A. There is a note in the list excluding the 16 section of Town 38,
25 range 8.

Q. In one, the 16th section is included, but nearly all the land lying anywhere near it——

A. All this white land [indicating] is excluded; the rest is in the reservation.

Q. So that section 29, 31 here is excluded?

A. Yes, sir.

Q. On the other hand, section 16 or a portion of it——

A. In 40, range 6——

Q. This apparently is entirely detached from the rest of the reservation?

A. This is detached from the rest of the reservation.

Q. Have you on file entries showing when this land was surveyed, Mr. Foresman?

A. Yes, sir; I have the filed entries of Township 40, range 8 west.

Q. When was section 16 of 40 surveyed?

A. The east line of section 16 was surveyed August 8th, 1855.

Q. And the south line?

A. The south line of section 16 was surveyed August 29th, 1855; the west line, that is north between sections 16 and 17, was surveyed August 30th, 1855, and the north line between sections 9 and 16 was surveyed the same day, August 30th, 1855. The 29th and 30th, inclusive, the survey was made.

Q. In 1885?

A. Yes, sir.

Q. I will ask you, so as to make it definite, in what county that land, as described on that chart, is.

A. I will have to have the map. [Map shown witness.] Town 40, range 8 is in Sawyer County.

Q. Do you know the location; is it east or west?

A. West of the 4th principal meridian.

Q. And these are the lands described in that list?

A. The lands described in this list and on the plat of the Indian reservation.

26 Q. Have you any document relating to this land?

A. No; I have no other documents.

Gen. RICHARDSON. Any letters from the commissioners—letters from the Government office?

A. Mr. Hacker acknowledged all those.

Mr. HARPER. Mr. Foresman, what is the practice of the Department as to selling lands in this State in the land office here; what sort of deeds do you give?

A. We give a kind of quitclaim deed of those lands; the title we give is what the United States Government gives us. In the 16 sections we give under the enabling act.

Q. Of 1846?

A. Yes; the swamp lands we give a patent.

Q. There is a certain land designated as swamp land?

A. Yes, sir.

Q. About how many acres?

A. 1,501 acres.

Q. Is that the land agreed upon as not part of the reservation?

A. Yes, sir.

Q. How is it marked on the plat?

A. It is marked on the plat as sold prior to the—these swamp lands were settled before the lands were withdrawn from sale.

Q. COURT. They don't constitute a part of the reservation?

A. Well, no; I should think, at the time, they would not constitute a part of the reservation, as they are reserved there in the list.

COURT. Is there other swamp land included that had not been settled up to that time?

A. Yes; we have swamp lands within the reservation and they have always denied us the title to those lands. We claim some sixty or seventy thousand acres now that are within the limits of the reservation. I demanded patents, but they would not give them to me until the Indian
27 title was extinguished. We still claim them under the swamp-land act of 1850.

Q. Are there any swamp lands in the reservation?

A. Besides these I don't recollect.

Q. Your statement is generally applicable to all lands?

A. Yes, sir.

COURT. I would like to have you look at the map and see if any meandered lakes, entirely surrounded by land, occur upon as constituting a part of the reservation.

A. Lands reserved from the reservation?

COURT. Whether there are any meandered lakes entirely surrounded by the land.

A. Yes, there is; in Town 39, range 7, there is a lake there entirely surrounded by land?

Q. Are there other lakes there?

A. There is a lake in Town 40, range 7; also, in 48, west.

Q. They are meandered, making fractional forties?

A. Yes, sir.

Q. The lake itself is not surveyed at all, is it?

A. It is meandered; most of those lakes are.

COURT. Of course those lakes would not be included in those figures going to make up the lands surveyed?

A. The acres are given in each lot.

COURT. All those pieces or fractions are surveyed around the lakes there?

A. Yes, sir.

[illegible]r. Foresman, if called upon, the land department here will make [illegible] to any land it is requested to make a patent for, will it not, if it [illegible] claim or shadow of claim at all to it?

[illegible]Well, I question whether we would make any patent of land on [illegible]we had no title without an act of the legislature; we have made [illegible] by an act of the legislature.

28 Q. And which you considered perfect title?

A. We have considered patents perfect within the Indian reservation, and we have sold these lands and given certificates; we sold these lands under contract, and either gave a certificate or patent. We have been authorized heretofore by the Government to withdraw certain lands from sale, and on a change of Commissioners they would have a different opinion, and we would go on and sell the land. We have sold sixteen sections belonging to the reservation and had to recall it. It is only within the limits of the reservation, of course; the other we have no trouble with.

Q. Do you know whether this section in 40, range 8 west, has been sold?

A. I do not know; I think it has. I didn't examine the records. Of course, I could find out whether it has been sold and when it was first offered for sale. Our records show any lands that were offered for sale. I think this section, though, has been sold.

Q. According to the rules of your office, you, of course, make no grant of any of those school sections until after the survey has been completed?

A. No; we never sell any until the survey has been made.

29 Col. T. L. HACKER called and sworn.

Direct examination. Mr. HARPER:

Q. What is your full name, please?

A. T. L. Hacker.

Q. What is your residence?

A. Madison.

Q. What is your business?

A. I am the executive clerk.

Q. Employed in the executive office of the State?

A. Yes, sir.

Q. How long have you been employed there?

A. Sixteen years last May.

Q. As executive clerk?

A. Yes.

Q. You may state whether this document came from the executive office and from under your custody.

A. Yes, sir; that [indicating] is a letter that is on file in the Department.

Q. Is that a letter taken from the files of your office?

A. Yes.

Q. From whom does it purport to come?

A. From the Department of the Interior, written by the Commissioner of the General Land Office December 16th, 1870.

Q. To whom addressed?

A. Hon. H. E. Paine, officer of Representatives.

Q. Member of Congress of this State?

A. Yes, sir. tment

Q. You may read it. deeds

WITNESS (reading). "Sir: Refer'ing to my letter to you of 6th e give acknowledging receipt of the letter of T. W. Gibbs, esq., relative dian reservation in the State of Wisconsin, and the rights of the St e give

the 16th sections and the lands selected as swamps therein. I have now the honor to state that the existing reservations are the La Point', La Court Orielles, Lac de Flambeau, Red Cliff, and Menominee, in which latter is included the Stockbridge and Munsee reserve. The treaty of September 30th, 1854, with the Chippewa Indians (U. S. State,
30 Vol. 10, page 1109), provides, in 2nd section, 1st article, for a reservation for the La Point' band of Indians, designated by special metes and bounds, and which embraces the following lands: North half of Township 47, N., R. 1 W., Towns. 46, 47, & 48, R. 2 W., & Towns. 46, 47, & 48, R. 3 W.

"The 2nd article of the treaty provides for reservations for the other Wisconsin bands a tract of land lying about Lac de Flambeau and another tract on Lac Court Oreilles each equal in extent to three townships. The lands reserved under this article within which to make the selections were as follows: About Lac de Flambeau, townships 36, 37, & 38, of ranges 4 & 5 E., and on Lac Court Oreilles, townships 38, 39, & 40, of ranges 6, 7, & 8 W.

"By the 6th article of the treaty provision is made for the selection of four sections, each on or near the lake shore, for the Ontonagon band and that subdivision of the La Point' band of which Buffalo was chief.

"For the Menominees, which was under the treaty of 12th May, 1854 (Stat. Vol. 10, page 1,064), there was reserved by metes and bounds a tract of land embracing townships 28, 29, & 30, of ranges 13, 14, 15, & 16 E.

"The lands reserved under the treaty of 1854 for the La Point', Lac de Flambeau, & Lac Court Oreilles were then unsurveyed. No 16th sections existed, and, of course, whilst they remained so reserved the right of the State could not attach to any of those lands.

"The Lac de Flambeau reserve, however, was subsequently changed by order of the Department, dated 17th June, 1866, to the following tracts of the public lands, to wit: Parts of townships 39, 40, & 41, R. 6 E.; all of townships 40 & 41, R. 5 E.; parts of townships 40 & 41, R. 4 E. Of these the 16th section, in townships 40 & 41, R. 5 E., & 41, R.
31 4 E. are within the reservation. The lands previously withheld for this band were returned to the public domain and duly offered for sale, except 16th section, which is held as now inuring to the State.

"Since the lands in the present reserve were *surveyed public lands* at the date of the reservation, the State had, of course, already acquired a right to the 16th section and to any swamp lands previously selected and duly reported.

"With reference to the Lac Court Oreilles reserve, this reservation has also been changed in its limits, but only by contraction, so as to conform to the extent authorized by the treaty; it now embracing part of township 40, R. 6 W.; all of township 39, R. 7 W.; part of town. 40, R. 7 W.; part of 38 and all of 39 & 40, R. 8 W.; and the lands outside of these lines are now public lands & have been brought into market as in the first instance. The 16th section of each of the above townships, except town. 40, R. 7 W., is embraced within the reserve, and since these lands were at the date of reservation unsurveyed and have not been returned to the public domain or opened to disposal as other public lands in Wisconsin, we are of the opinion that the State has never acquired title to said 16th section, nor can we recognize the swamp land sections within the present

limits of said reserve, for the reason that the sections were made whilst the lands were in a state of reservation, from which they have not since been relieved. The same argument relates to the La Pointe band of Indians, which has remained as originally reserved."

WITNESS (speaking). Further statement is made in reference to the Menominees' lands, reading of which is omitted.

Mr. HARPER. There is no further reference to these lands of the reservation?

32 WITNESS (reading). "Summing up our argument you will perceive that our opinion is adverse to the right of the State to the 16th sections or the selected swamp lands in the Lac Court Oreilles, La Pointe, and Menominee reservations but in favor of the right of the State to such lands in the limits of the present Lac de Flambeau and Red Cliff reserves. Yet the policy of disposing of the same whilst held within the limits of these reservations and thus bring foreign interests in conflict with the Indians may well be questioned. Very respectfully, James S. Wilson, commissioner." It is is dated "December 16th, 1870."

Cross-examination by Gen. RICHARDSON:

Q. Have you any further documents relating to the same subject?

A. There may be some in the office that are not here. The letters pertaining to this Indian reservation are put together in a box, and I hastily glanced them over and took such as I thought pertinent.

Q. Have you any other letters with you from the Department pertaining to the lands on the Lac Court Oreilles Reservation?

A. Not that I know of.

Mr. HARPER. Look through these colonel [indicating documents].

A. It is a general letter from ex-Governor Taylor simply making claim to all these lands; nothing special in regard to that reservation. Here is a letter from the Commissioner of the General Land Office, dated December 6, 1870. He simply says that the point raised will require examination before it can be answered. There is also here a copy of the letter of James S. Wilson.

Q. What is the date of it?

A. December 7, 1870.

Mr. HARPER. Does it relate to this subject?

A. It refers here on this page to Red Cliff and Bad River reservation.

Witness dismissed.

33 COURT. Have you any other evidence?

Mr. FORESMAN recalled.

Ben. RICHARDSON. Has the State of Wisconsin ever, by any act of cession on its part, ceded these lands back to the government, section 16, 40, 8?

A. No, sir.

Witness dismissed.

COURT. The decision of the court is reserved on this point. The case goes to the jury on its merits.

34 ALEX CORBINE recalled and testified.

Direct examination by Mr. FRUIT (through interpreter):

Q. How long have you lived on the Lac Court Oreilles Reservation?

A. Over forty years.

Q. Ask him if he has lived there continuously for the last forty years.

A. He has made his home there for forty years.

Q. Has the Lac Court Oreilles Reservation there in Sawyer County been occupied by the Chippewa tribe or a band of the Chippewa tribe during these last forty years?

(Objected to.)

COURT. He may answer.

A. Yes; it has been occupied.

Q. How many Indians, upon an average, have lived upon this Lac Court Oreilles Reservation during the last forty years?

A. He doesn't know; he never counted them.

Q. Ask him if there has always been, during these forty years that he has lived there, as many as there are now.

A. There used to be more of them than there are now.

Q. Ask him if he knows about how many there are now on the Lac Court Oreilles Reservation.

A. He doesn't know.

Q. Ask him if he knows whether it was occupied by the Chippewa Indians before he lived there?

A. They occupied before he was there.

Q. Ask him if he knows the outward boundary limits of the Lac Court Oreilles Reservation.

A. He knows.

Q. Ask him if the Chippewa Indians at any time during the last forty years have occupied this particular locality where David Corbine was killed.

35 A. They have occupied all around this spot, but did not occupy exactly the spot where this murder was committed.

Q. In what way have they occupied all around this spot?

A. They have lived and made sugar and built their canoes not far from there.

Q. Ask him if they have ever had houses or tepees there.

A. They have built wigwams there.

Q. Ask him if he has ever known wigwams to be built on this particular section—section 16, town 40, range 8 west.

A. He has seen wigwams there.

Q. Built on this section?

A. Yes, sir.

Q. How long has it been since he has seen wigwams built on this section 16?

A. It is a long time ago.

Q. Ask him if the Indians have had roads and trails right along continuously during the last forty years upon or over this section 16.

A. There has been what is called an Indian trail there.

Q. Through this section 16?

A. There has been a trail always right through where this murder was committed.

Q. Ask him if part of this road known as the short cut or cut off between Hayward and Lac Court Oreilles village runs upon or over this section 16.

A. He thinks it runs through this section 16.

Q. Who laid out this road or first began to travel it, if he knows?
A. He thinks that a man by the name of Gurnoe cut this road through.
Q. Was he an Indian?
A. He was a half-breed.
Q. Was he living upon this reservation at that time?
A. Yes.

36 Cross examination by Gen. RICHARDSON:

Q. Do Indians ever build wigwams except by the side of the water?
A. Very often in the winter time they would camp away from the water.
Q. Is section 16, town 40, range 8, located on the water?
A. He couldn't say for certain.
Q. Do you know where section 16, town 40, range 8 is located?
A. All he knows is that he has been told that that was school land—that section 16.
Q. Where was the sugar bush which he speaks of that they made sugar from?
A. Towards Round Lake.
Q. Is there any sugar bush on section 16?
A. No.
Q. Is it not pine land?
A. It is pine land.
Q. At what place on section 16 did you see the tepees or wigwams located a number of years ago?
A. It was quite close to the road where the road run then.
Q. Where did the road run at the time you saw those wigwams?
A. Right where the road runs now at the present.
Q. How many years ago was that?
A. It is over twenty years ago.
Q. How many wigwams were there located there?
A. Four.
Q. Was this in the summer or winter?
A. In the winter time.
Q. Where did they get their water at that time?
A. They melted snow.
Q. Do you know where the road is now in section 16; I mean the Round Lake road?
A. He doesn't know exactly on what part of the section the road runs now.

37 Q. Does the road run now where the road run when you knew it twenty years ago, when those wigwams were there that you spoke of?
A. Yes; right in the same place.
Q. Do you know where what is known as the short cut is located; where it goes into the main road?
A. Yes.
Q. How close to that point where this short cut enters the main road, near where this difficulty occurred, were those tepees or wigwams located that you spoke of?

A. Very near where the road comes into the main road now, on the right hand side of the main road where it is at present.

Q. On the right hand side going which way?

A. On the right hand side of the road going towards Lac Court Oreilles.

Q. You are sure now, it is on section 16?

A. He is not very certain; he was told that it was in section 16.

Q. When was it that you first remembered the fact that there were some wigwams on this section 16?

A. He has known that for the last twenty years.

Witness dismissed.

38 O-MIS-QUE-WE-GE-ZEK called and sworn by means of an interpreter.

Direct examination by Mr. FRUIT:

Q. Ask him his name.

A. O-Mis-Que-We-Ge-Zek.

Q. Ask him if he knows his name.

A. Yes; he does.

Q. What is it?

A. It means "the sky is red."

Q. Ask him if he is sometimes called Red Sky?

A. No.

Q. Is he called Red Day?

A. No.

Q. Ask him if he knows how old he is.

A. Between sixty and seventy years old.

Q. Where does he live now?

A. At Round Lake.

Q. On the Court Oreilles Reservation, in Sawyer County?

A. Yes.

Q. Does he belong to the Chippewa band of Indians?

A. Yes.

Q. How long has he lived at Round Lake?

A. Seven years.

Q. Ask him how long has been acquainted with or known La Court Oreilles Reservation.

A The first time he ever saw La Court Oreilles he was about that tall [holding hand about as high as the table].

Q. Ask him if he knows how old he was when he first saw it.

A. He don't know.

Q. Was he about ten years old?

A. He might have been ten years old.

Q. He was about so high?

A. He was there at that time (when he was so high).

Q. Ask him if it was occupied by the Chippewa Indians then.

A. Yes.

Q. Ask him if it has been occupied continuously around La Court Oreilles Lake and Round Lake ever since.

A. They have lived around La Court Oreilles there. He was living about Round Lake.

39 Q. Ask him if he knows how many Indians are at Lac Court Oreilles.

A. He don't know.

Q. Ask him if he knows whether there were more or fewer Indians at the time he first knew it than there are living there now.

A. There was more at the time he first went there than there are now.

Ask him how frequently he was at Lac Court Oreilles after the first time he ever saw it.

A. He didn't go there very often.

Q. Ask him if he knows whether or not the Chippewa Indians have hunted and fished upon the territory round about Lac Court Oreilles from the time he first knew it up to this time.

A. They have always been around there in the neighborhood of Lac Court Oreilles hunting and fishing.

Q. And living there?

A. Yes; living there.

Q. Ask him if they lived and hunted and fished there for some miles around Lac Court Oreilles village.

(Objected to as immaterial and irrelevant.)

COURT. Only on the question of jurisdiction; don't spend much time on that. It is competent to show that they had occupied previous to the selection of these lands by the Indians generally. I don't know as it is very material. I suppose the selection would govern the reservation. He may answer.

(Exception by defendant's counsel.)

A. Yes; they have.

Q. I understood him to say there was no village at Round Lake when he first knew it. Ask him if there were Indians living around about Round Lake when he first knew it.

A. When he first saw Round Lake he saw a few Indians there.

Q. Ask him if they were Chippewa Indians.

A. Yes; they were Chippewa Indians.

40 *Facts in case as stipulated by attorneys.*

41 United States of America, western district of Wisconsin, in circuit court.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* MICHEL THOMAS, DEFENDANT. } Facts in case as stipulated by attorneys.

This is a case coming into the jurisdiction of this court under section 2342 of the Revised Statutes of the United States, as amended by chapter 341 of the laws of Congress of 1885, 23d General Statutes, page 385, and conferring upon the United States courts jurisdiction for the trial of certain offenses committed within the limits of the Indian reservation situated within the boundaries of a State by an Indian against the person or property of another Indian or other person. The indictment in this case is for murder, and the defendant, Michel Thomas, who is a full-blood Indian of the Chippewa tribe, is charged with having feloniously killed one David Corbin, a half-breed Indian boy of the same tribe, on the 1st of

August, 1890, and within the limits of the La Court Oreilles Indian Reservation. The trial of the defendant was had at the December term, 1890, at Madison, in said district, and occupied several days, resulting in the jury's returning a verdict of guilty as charged in the indictment.

The evidence tended to show that the offense was committed on a section 16, within said reservation, and upon this point counsel for the defense have moved for an arrest of judgment and setting aside of the verdict herein, claiming that said section 16 belongs to the State of Wisconsin or its grantees under the provisions of the enabling act of 1846 pro-
42 viding for the application of such section in every township for school purposes of the State. On the — day of January, 1891, said motion was argued in this court, Judges Gresham and Bunn presiding.

La Court Oreilles is situated in Sawyer County, and is one of the three reservations set apart for the Chippewa bands of Indians in said western district. It comprises three townships in actual area, but by reason of the exclusion of a number of meandered lakes and pieces of swamp land, it covers about seven Government townships. The reservation was provided for by treaty of 1854, to which reference is had. See Revised Indian Treaties, page 222. No survey of the lands of this portion of the State had then been made, and the townships which compose the reservation in question were not surveyed until August, 1855.

The prosecution introduced as evidence the original instrument on file in the land office of the State of Wisconsin, showing the selection of land made for this reservation. This document bears date of execution June 22, 1859, and is signed and sealed by the Indian chiefs and bandsmen of this tribe. The following is a copy: "Lands selected by the La Court Orielles band of the Chippewas of Lake Superior, at La Court Orielles, Wisconsin, on the 22 day of June, A. D. 1859, in compliancewith the 3d clause of article 2 of the treaty made at La Point on the 13th day of September, 1854, between David B. Herriman and Henry C. Gilbert, commissioners on the part of United States, and the Chippewa Indians of Lake Superior and the Mississippi by their agents and headsmen."

Said selection of lands made by the agents of the La Court Orielles band of the Chippewas of Lake Superior, and Matthias Martin, special agent of the United States at Lac Court Orielles, Wisconsin, on this 22d day of June, A. D. 1859.

43 (Here follows a detailed description of the land by sections and fractions of sections, giving the actual acreage of each separately. In town forty (40), range eight (8), every section is thus specifically mentioned, section sixteen (16) and its acreage being itemized with the rest. The same is true of section (16), in town thirty-nine (39) of range eight (8) and that section where it occurs in the other townships embraced within the limits of the reservation.)

"We, the undersigned chiefs and headsmen of the La Court Orielles band of Chippewa Indians, of Lake Superior, do hereby select and acknowledge the within-described lands as being made by us at La Court Orielles, Wisconsin, in compliance with the third clause of the second article of the treaty made at La Point on the 30th day of September, 1854.

"It is also hereby agreed to use all our authority and influence to induce our people to abandon the lands sold or ceded to the United States by us

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42 viding for the application of such section in every township for school purposes of the State. On the —day of January, 1891, said motion was argued in this court, Judges Gresham and Bunn presiding.

La Court Oreilles is situated in Sawyer County, and is one of the three reservations set apart for the Chippewa bands of Indians in said western district. It comprises three townships in actual area, but by reason of the exclusion of a number of meandered lakes and pieces of swamp land, it covers about seven Government townships. The reservation was provided for by treaty of 1854, to which reference is had. See Revised Indian Treaties, page 222. No survey of the lands of this portion of the State had then been made, and the townships which compose the reservation in question were not surveyed until August, 1855.

The prosecution introduced as evidence the original instrument on file in the land office of the State of Wisconsin, showing the selection of land made for this reservation. This document bears date of execution June 22, 1859, and is signed and sealed by the Indian chiefs and bandsmen of this tribe. The following is a copy: "Lands selected by the La Court Orielles band of the Chippewas of Lake Superior, at La Court Orielles, Wisconsin, on the 22 day of June, A. D. 1859, in compliancewith the 3d clause of article 2 of the treaty made at La Point on the 13th day of September, 1854, between David B. Herriman and Henry C. Gilbert, commissioners on the part of United States, and the Chippewa Indians of Lake Superior and the Mississippi by their agents and headsmen."

Said selection of lands made by the agents of the La Court Orielles band of the Chippewas of Lake Superior, and Matthias Martin, special agent of the United States at Lac Court Orielles, Wisconsin, on this 22d day of June, A. D. 1859.

43 (Here follows a detailed description of the land by sections and fractions of sections, giving the actual acreage of each separately. In town forty (40), range eight (8), every section is thus specifically mentioned, section sixteen (16) and its acreage being itemized with the rest. The same is true of section (16), in town thirty-nine (39) of range eight (8) and that section where it occurs in the other townships embraced within the limits of the reservation.)

"We, the undersigned chiefs and headsmen of the La Court Orielles band of Chippewa Indians, of Lake Superior, do hereby select and acknowledge the within-described lands as being made by us at La Court Orielles, Wisconsin, in compliance with the third clause of the second article of the treaty made at La Point on the 30th day of September, 1854.

"It is also hereby agreed to use all our authority and influence to induce our people to abandon the lands sold or ceded to the United States by us

and our fathers, and to rest with us upon the lands selected by us and described within our reservation and homes.

"In testimony whereof we, the chiefs and headsmen of said band, have hereunto set our hands and seals at this place aforesaid, this 22d day of June, A. D. 1859."

Signed by Aw-ke-wain-ze, "or the old man," 1st chief, and fourteen other Chippewa signers, and Matthias Martin, special agent of United States, with Alexion Corbin, A. B. Reed, and E. F. Maxer as witnesses. Achille Cadotte, interpreter.

The township in which the offense was committed is town forty (40) north, of range eight (8) west. A plat or map of the La Court Orielles reservation was also produced from the files of the State land office, and evidence was introduced showing that such map was furnished by the Interior Department of the United States. It shows the boundaries of the reservation, and purports to mark off and exclude all lands joining the reservation or lying within its boundaries not included as a part of the reserved area. Section sixteen (16), town 40, range 8, upon which the offense was committed, is marked and included as reserved land.

Evidence was wanting to show just when this map was made, but it was shown to have been sent from the Interior Department to the State land office in 1872 in response to a request from the commissioner of public lands of the State of Wisconsin for a perfect description, by townships, parts of townships, and sections, of all lands in Wisconsin embraced within the limits of platted Indian reservation. The request set forth that the State had already sold some of the reserved lands, and, to avoid all complications hereafter, desired the boundaries of the Indian Territory in the State positively defined, as claimed by the Secretary of the Interior. With this map was sent the instrument or contract between the United States, by its special agent, Matthias Martin, and the Indian chiefs, above set forth in full, together with a letter of the Commissioner of Public Lands of the United States, stating that such plats of the Indian Reservations in Wisconsin had been forwarded, and that they were compiled from the official records of the United States.

The prosecution also introduced in evidence from the files of the executive office of the State of Wisconsin an official letter of the Commissioner of the General Land Office, bearing date December 16th, 1870, addressed to Hon. H. E. Payne, member of Congress, which is as follows:

"SIR: Referring to my letter to you of the 6th inst., acknowledging receipt of the letter of T. W. Gibbs, esq., relative to Indian reservation in the State of Wisconsin, and the rights of the State of the 16th sections and the lands selected as swamp therein, I have now the honor to state that the existing reservations are the La Point, La Court Oreilles, Lac De Flambeau, Red Cliff, and Menominee, in which latter is included the Stockbridge and Munsee reserve. The treaty of September 30th, 1854, with the Chippewa Indians, U. S. Stats., Vol. 10, page 1109, provides in 2nd section, 1st article, for a reservation for the La Point band of Indians, designated by special meets and bounds and which embraces the following lands: north half of township 47 N., R. 1 W., towns 46, 47, & 48, R. 2 W., & towns. 46, 47, & 48, R. 3 W.

The 2nd article of the treaty provides for reservations for the other Wisconsin bands a tract of land lying about Lac de Flambeau and another tract on Lac Court Oreilles, each equal in extent to three townships, the lands reserved under this article, within which to make the selections, were as follows: About Lac de Flambeau townships 36, 37, & 38 of ranges 4 & 5 E., and on Lac Court Oreilles Townships 38, 39, & 40 of ranges 6, 7, & 8 W.

By the 6th article of the treaty provision is made for the selection of four sections, each on or near the lake shore for the Ontonagon band and that subdivision of the La Point band, of which Buffalo was chief.

For the Menominee, which was under the treaty of 12th May, 1854, State. Vol. 10, page 1064, there was reserved by metes and bounds a tract of land embracing Townships 28, 29, & 30 of Ranges 13, 14, 15, & 16 E.

The lands reserved under the treaty of 1854 for the La Point, Lac de Flambeau, & Lac Court Oreilles were then unsurveyed. No 16th sections existed, and of course whilst they remained so reserved, the right of the State could not attach to any of those lands.

46 The Lac de Flambeau reserve, however, was subsequently changed by order of the Department, dated 17th June, 1866, to the following tracts of the public lands, to wit: Parts of Townships 39, 40 & 41, R. 6 E.; all of Townships 40 & 41, R. 5 E; parts of Townships 40 & 41, R. 4 E.; of these the 16th section in Townships 40 & 41, R. 5 E., & 41, R. 4 4 E. *of these the 16th section in Townships* 40 & 41 *R.* 5 *E.*, & 41, *R.* 4 *E.* are within the reservation. The lands previously withheld for this band were returned to the public domain and duly offered for sale except 16th section, which is held as now inuring to the State.

Since the lands in the present Lac de Flambeau reserve were surveyed public lands at the date of the reservation, the State had, of course, already acquired a right to the 16th section and to any swamp lands previously selected and duly reported.

With reference to the Lac Court Oreilles reserve, this reservation has also been changed in its limits, but only by contraction so as to conform to the extent authorized by the treaty, it now embracing part of Township 40, R. 6 W., all of Township 39, R. 7 W., part of Town 40, R. 7 W., part of 38 and all of 39 & 40, R. 8 W., part of Town 40, R. 7 W., part of 38 and all of 39 & 40, R. 8 W., and the lands outside of these lines are now public lands & have been brought into market as in the first instance. The 16th section of each of the above townships, except Town 40, R. 7 W., is embraced within the reserve, and since these lands were, at the date of reservation, unsurveyed, and have not been returned to the public domain or opened to disposal, as other public lands in Wisconsin, we are of the opinion that the State has never acquired title to said 16th section; nor can we recognize the swamp-land sections within the

47 present limits of said reserve for the reason that the sections were made whilst the lands were in a state of reservation from which they have not since been relieved. The same argument relative to the La Point band of Indians which has remained as originally reserved. Summing up our argument you will perceive that our opinion is adverse to the right of the State to the 16th sections or the selected swamp lands in the Lac Court Oreilles, La Point, and Menominee reservations, but in favor of the right of the State to such lands in the limits of the present Lac de

Flambeau and Red Cliff reserves. Yet the policy of disposing of the same whilst held within the limits of these reservations and thus bring foreign interests in conflict with the Indians may well be questioned.

Very respectfully,

JAMES S. WILSON,
Commissioner.

Evidence was introduced showing the location of section sixteen (16) and the character of the Indian reserve and the general description of that part of it where the homicide was committed. The principal Indian village of the reservation is near the east boundary and upon the La Court Oreilles Lake. The county seat of Sawyer County is Hayward, about ten miles west of the western boundary of the reservation and about eighteen (18) miles from La Court Oreilles village. From the village to Hayward is a trail or highway called the Round Lake road. Between the western boundary of the reservation and Hayward, and about six miles from the latter, a road called the short cut strikes off from the Round Lake trail or highway, and joins the latter upon the reservation about two miles within its limits and near the southeast corner of section sixteen (16) in township forty (40), range eight (8), before mentioned. Near this point of intersection the murder was committed, being, as the testimony tends to show, five or six rods from the eastern line and three or four rods from the southern line of said section. The country here is wild, unim-
48 proved, and devoid of habitations. Most of it was at one time covered with pine timber, but considerable tracts have been removed, and the body of the pine upon said section sixteen (16) was cut many years ago by speculators, to whom the State had sold such section in 1865. Timber from the joining sections has also been removed. No house had been put upon the section, except at the time of the cutting of the timber, when a cabin was built for the temporary shelter of the woodsmen and loggers. Except for the removal of the pine and the existence of the trails, no change from the primeval condition of the tract had been made. The testimony of witnesses who had known the land for half a century was introduced to show that the lands comprising the reservation had been kept by the Indians continuously before the reservation was located; that from time immemorial the Indians have hunted and fished over this particular part of the country, and that until the removal of the timber from said section sixteen (16) the reservation people had been want to erect their tepees upon it, build their canoes and occupy the land as they had theretofore immemorially done, and that after its being denuded of its timber they had continued to travel and hunt across and over it.

It was shown that the reservation embraces meandered lakes and sundry small tracts, usually of forty (40) acres each of swamp land, some of the latter being claimed and occupied by private parties, a few of them white men, none of which are included as part of its territory, however. The defense contends that said section sixteen (16) was lawfully held in fee by the grantees of the State, and that although entirely within the boundaries of the reservation it was not a part of it, and is exclusively within the jurisdiction of the State so far as the offense under consideration is concerned.

49 That the Indians were not occupying section sixteen (16) at the time of the treaty of 1854, which provided for the establishment of the reservation in question.

That the lands were surveyed in 1855 prior to the selection of the reservation, that the instrument by which the chiefs and headmen selected the reservation in 1859 shows that they were not then occupying the land, and that they agreed to abandon the land then held and reside upon the lands so selected, and that it was impossible for the Government to make a reservation for the Indians of land upon which no Indian could go without being liable as a trespasser; that the United States could not subject land thus held by the State for reservation use.

50 The prosecution contends that the title to said section sixteen (16) vested in the State only subject to the Indian occupancy; that this occupancy having extended from time immemorial, and the land in question having been practically located as a part of the reservation prior to its survey, and no cession of the rights of the Indians ever having been made of it, the State was not authorized to convey it, except subject to the reservation use; that this use had been continuous and unbroken; that the removal of the timber from said section sixteen (16) was a trespass upon the rights of the Indians, and that neither the State nor its grantee could obtain any rights thereon until the Indian use and occupancy had been lawfully extinguished.

The prosecution further contends that it made no difference whether or not the title had vested in the State; that the jurisdiction of the Federal Government was not extended over the reservation lands on the basis of ownership merely, but that the law and Congress went upon the theory that the subject-matter dealt with, being Indian wards of the nation it was proper to provide for their government within the general boundaries of their reservations; that if an offense should occur upon private lands within such boundaries, it was not the intent of Congress to make such place of private ownership an asylum of refuge, thereby exempting an offender from punishment by Federal law.

The defendant and David Corbine, whom he killed, were Indians belonging to the La Court Oreilles band, under the charge and superintendence of the Indian agent and subagent for such reservation. The minutes of testimony relating to jurisdiction are submitted herewith.

SAMUEL A. HARPER,
United States Attorney,
And JOHN J. FRUIT,
Assistant U. S. Attorney.
HOLLON RICHARDSON and
ROGERS & HOLT,
Attorneys for Defendant.

51 And now at this same term, to wit, December term, A. D. 1890, in the record of the proceedings thereof before the honorable Walter Q. Gresham and the honorable Romanzo Bunn, judges, is the following entry:

UNITED STATES OF AMERICA
vs.
MICHEL THOMAS. } Indictment.

The motion of the defendant to set aside the verdict and for a new trial, etc., came on to be argued and was argued by the counsel for the

respective parties, and upon the hearing it occurred as a question "whether as the evidence shows that the murder was committed upon section sixteen in Township forty, north of range eight west, in the State of Wisconsin, said section sixteen being within the outside limits of the said Indian reservation and having been previously, in 1859, settled, platted, and set apart by the United States as a part and parcel of said reservation and ever after occupied by said Indians as such, though claimed and sold by the State of Wisconsin as and for a part of the school land previously ceded to said State by act of Congress; such murder was committed
52 within the limits of said reservation within the meaning of section nine of chapter 341 of the acts of Congress approved March 3d, 1885, so as to give the Federal courts jurisdiction of the offense, on which question the opinions of the judges were opposed, which said opinions are herewith transmitted."

"The court considering as the whole case now turns upon the question of jurisdiction in this court, and no proceedings can be had until that question is determined and that the same question would arise in any subsequent trial, that it is not one addressed to the discretion of the court but is proper to be certified to the Supreme Court for its opinion." Whereupon on motion of the United States, by its attorneys and counsel, it is ordered that the point upon which the disagreement hath happened as herein stated under the direction of the judges, including the entire record of proceedings in court, the evidence on the trial, and statement of facts as stipulated by the attorneys herein, also copy of the said indictment be and same hereby are made a part of the transcript certified under the seal of this court, according to the request of the United States, by its counsel, to the Supreme Court, that the matter may be finally decided.

53 CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

UNITED STATES
vs.
MICHEL THOMAS.

Before Judges Gresham and Bunn.

GRESHAM, C. J.:

Michel Thomas, a full-blood Indian of the Chippewa tribe, was convicted of the murder of David Corbine, a half-breed of the same tribe, and a motion was made in arrest of judgment. Section 9 of the act making appropriations for the Indian Department for the fiscal year ending June 30, 1886 (23 Stat. at Large, p. 385), reads: "That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to such crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby

given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian, or other person, within the boundaries of any State of the United
54 States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

The indictment charged that the offense was committed in the State of Wisconsin, within the limits of Lac Courtes Oreilles Indian Reservation. Section 7 of an act passed in 1846 (9 Stat. at Large, 58), admitting the Territory of Wisconsin into the Union as a State, ceded to the State, for the use of schools, section 16 in every township of public lands within the State not sold or otherwise disposed of. The United States entered into a treaty with the Chippewa Indians in 1854, by which, in consideration of certain relinquishments made by them, the Government agreed to set apart and withhold from sale a tract of land on Lac Court Oreilles, equal in extent to three townships, the boundaries of which should be thereafter agreed upon or fixed under the direction of the President. The lands in that part of the State were not surveyed until a year after the treaty. In 1859 Lac Courtes Oreilles Reservation was established in accordance with the terms of the treaty, and the chiefs and headmen, who represented the tribe, agreed to use every effort to induce their people to abandon the lands ceded to the United States by the treaty and reside upon the reservation.

In 1872, the Indian Department sent to the State's land office a map of the reservation, showing the exterior boundaries, as well as interior lines embracing lands not made part of the reservation. The offense was committed on one of the sixteenth sections thus designated on the map. The State sold this section in 1865, and its grantee entered into possession and denuded the land of its pine timber.

55 The title to the sixteenth sections of the surveyed lands vested in the State when it became a member of the Union under the act of 1846, and the title to the sixteenth sections in the unsurveyed public domain in the State vested in it when those sections were subsequently located and defined by surveys. The sixteenth sections within the exterior boundaries of the reservation, as it was agreed upon and established in 1859, had belonged to the State since 1855, and the Government had no more right to take them for an Indian reservation than it had to take the lands of individual proprietors for the same purpose. The State's right of dominion over these sections, including the right to sell, became complete when they were located by the survey in 1855. The Government's right to occupy, or otherwise control them, then ceased, and it follows that the Indians thereafter acquired no right of occupancy from the Government. The treaty of 1854 provided for the establishment of a reservation to be subsequently agreed upon, but if the time of the treaty had been different the State's right to the sixteenth sections under the grant of 1846, would not have been impaired.

The offense was committed in 1889, on one of the sixteenth sections within the outer boundaries of the reservation, but not on land constituting part of it. That section was sold by the State in 1865, and the purchaser entered into possession and denuded it of its pine timber, as he lawfully might.

A fair interpretation of the last clause of the statutes quoted shows that Congress intended to confer jurisdiction on the Federal courts to punish Indians who committed the specified offenses upon an Indian reservation in a State—that is, upon lands belonging to the United States within
56 a State and occupied by Indians as a reservation.

The court has no jurisdiction of the offense, and the motion is sustained.

SAMUEL A. HARPER,
U. S. Attorney.
HOLLEN RICHARDSON,
Defendant's Attorney.

57 BUNN, D. J.:

Believing as I do that the court has jurisdiction of this case, I am compelled to dissent from the conclusion reached by the circuit judge. I can not think that the jurisdiction of the court turns upon the question of the Government's title to the land on which the offense was committed. Moreover the section sixteen upon which the murder was committed had always been a part of the Indian country, and the possessory title of the Indians to it had never been divested, unless by the treaty which gave them this with other lands. In 1854 a treaty was made between the Government and the Indians, by which the Indians were to take in lieu of all the lands which they occupied and for a long time before had occupied in that region, the equivalent of three (3) townships of land in Sawyer County. This was before any survey of the land was had. During the next and subsequent years the land was surveyed, and in 1859, by agreement between the Commissioners on the part of the Government and the Indians, the treaty of 1854 was carried into effect by a selection and location of the lands. The land was taken in contiguous and in as compact form as possible, and this section sixteen, where the murder was committed, was a part of the reservation agreed upon.

The land so selected and agreed upon pursuant to the treaty was withdrawn from market and platted and set apart by the Government for the use of the Indians, who have occupied it as a reservation under the charge and superintendence of the Government for thirty-seven years since the date of the treaty, and for thirty-two years since the date of the selections in June, 1859. Whoever should be considered as the owner upon a proper trial of the question of the title to section sixteen, one thing is manifest,
58 that this section, with all the others going to make up the reservation had constituted a reservation *de facto* for all that time, and as such, the Government has claimed and exercised jurisdiction over it. And now comes in the statute Sec. 9, Chap. 341, laws of 1885, and says that all Indians committing murder, manslaughter, rape, assault with intent to kill, arson, burglary, or larceny against the person or property of another Indian, or other person within the boundaries of any State of the United States and within the limits of any Indian reservation, shall be subject to the same laws, tried by the same courts, and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

Section sixteen, as shown by the evidence, is within the outside limits of the reservation, it being two miles from it to the nearest outside limit.

It is also a part of the land actually selected by the Commissioners pursuant to the treaty, and platted and set apart by the Government for the use of the Indians, and though in 1865, the State of Wisconsin assumed to sell it, and the purchaser went on and stripped it of the pine timber growing upon it, it has been vacant and unoccupied always, except as used and occupied by the Indians previous to the treaty in 1854, under their own possessory right which was always recognized by the Government, and since that time as a part of the reservation selected and set apart by the Government for their occupancy and use.

Why then is it not within the limits of the reservation within the true meaning of the law of 1885 so far as the question of jurisdiction is concerned? It seems certain that the United States has assumed jurisdiction over this land for the government of the Chippewa Indians and
59 I fail to discover any intrinsic difficulty in its doing this, especially so long as the Government does not by the statute in question assume to take jurisdiction to punish for the offenses named, on the ground of exclusive Government jurisdiction over the territory (as in the case of the District of Columbia, and forts, arsenals, shipyards, etc., within the limits of any State, where the Constitution gives exclusive jurisdiction of other criminal offenses committed within a State of the Union), but upon the ground that the subject matter is one of national cognizance.

The statute under which the prisoner was tried received full and exhaustive consideration by the Supreme Court in United States *vs.* Kagama (118 U. S., 375), and the jurisdiction of Congress to pass the act, and that of the United States court to punish for the offenses named therein, were sustained—not, as I read that case, on the ground of exclusive jurisdiction because of the Government's owning the land or having general or exclusive governmental jurisdiction over the territory embraced within an Indian reservation, but because the subject matter, which is the management and control and government of the Indians under the charge of the United States, is necessarily one of national cognizance.

"The Indian tribes were the wards of the nation. They were communities dependent on the United States for their political rights. They owned no allegiance to the States and received from them no protection. Because of the local ill feeling the people of the States where they were found were often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, there arose a duty of protection and with it the power. This had always been recognized by the executive and by Congress and by the Supreme Court whenever the question had arisen. For
60 this reason it was within the power of Congress to enact the law giving the United States jurisdiction of these crimes." The statute was again up for consideration by the same court in Con-Shay-ee, petitioner (130 U. S., 343), and the former decision of the court recognized and affirmed.

Of course the jurisdiction of the courts is limited by the words of the statute. The offense must have been committed within the limits of an Indian reservation within a State. Not that Congress might not probably have made the law broader and given jurisdiction over the same offenses committed by an Indian under the charge and superintendence of

the Government in any part of the State, as it had before given a like comprehensive jurisdiction under the statute relating to the sale of intoxicating liquor to Indians under the charge of an Indian agent. But it did not. The offense must be committed within the limits of an Indian reservation, to give the court jurisdiction.

As said by Deady, J., before the law of 1885 was enacted, in United States vs. Barnhart (22 Fed. Rep., 288): "The question is not one of power in the National Government, for, as has been shown, Congress may provide for the punishment of this crime whereever committed in the United States. Its jurisdiction is co-extensive with the subject-matter, the intercourse between the white man and the tribal Indian, and is not limited to place or other circumstances."

I can not see that the question of title is at all material. I suppose that when Wisconsin was admitted into the Union as a State by the enabling act of 1846, considerably more than one-half of the whole State was Government land, and the title still in the United States. But upon its becoming a State general governmental jurisdiction in local matters
61 passed from the Government to the new State, and that without regard to the title to the land, whether in the Government, in the State, or in individuals. The United States only retained jurisdiction over subjects of national concern and cognizance, except as to any places within the State purchased by the Government with the consent of the legislature of the State for the erection of forts, magazines, arsenals, dockyards, and other needful buildings according to Art. 1, Sec. 8, of the Constitution.

Congress could not give the United States courts general jurisdiction to punish for murder or rape or robbery though these crimes should be committed upon land belonging to the General Government. But the General Government retained jurisdiction over all subjects of national concern and cognizance, where the subject-matter gave to it jurisdiction under the Constitution. And it is on this ground that jurisdiction comes to these courts under the statute in question, and not at all upon ground analogous to that where jurisdiction is taken within States over all crimes committed upon land owned and occupied by the Government for the purpose of the erection of forts, arsenals, dockyards, &c.

Of the two hundred or more prosecutions by indictment brought in the United States district and circuit courts of this State, when it has been my duty to preside, within the last year, in not a single instance, unless this case be an exception has jurisdiction been given to these courts upon any other ground than that the subject matter of indictment was of national concern under the Constitution and laws of the United States.

Now, then, if the title is not a necessary element in the question, the only inquiry is whether the murder was committed within the lim-
62 its of an Indian reservation set apart and recognized by the Government and actually occupied by the Indians for reservation purposes. And that it was, is evident from the testimony and undisputed facts.

It did not seem to me to be worth the while or very appropriate to look into and decide a question of title arising, as this did, in a collateral way in a criminal proceeding, unless absolutely necessary. The State was not a party and could not be bound by any decision that might be made. It was in evidence that the title to these sixteenth sections within this reser-

vation had been in dispute. The State claimed these under the enabling act for Wisconsin which provided, "That section numbered sixteen in every township of the public lands in said State and, where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools."

The Land Department at Washington had always claimed that, by the treaty with the Chippewa Indians already referred to made in 1854, the sixteenth sections, of which there are three included in the reservation, had been disposed of by the Government before any survey of the lands were made, and consequently before the claims of the State could attach. And this contention seems plausible. The land in that vicinity had always been Indian land and occupied by them. The evidence showed certainly for fifty years, which is as far back as the memory of the witnesses ran. It had in fact been occupied by them from time immemorial. The Government recognized their possessory right, and set to work to make a compromise by which the Indians were to take and keep possession of a definite portion of these lands and to give up all claim to the rest. With
63 this view the treaty of 1854 was entered into. Now, it was exceedingly desirable that the three sections to be devoted to the exclusive use of the Indians, and on which definite allotments were to be made to individuals in severalty should be composed of contiguous territory and be in as compact form as possible. Every consideration looking to the well being both of the Indian tribe and the white people of the State pointed that way. But how could such a policy—no doubt contemplated by the treaty—be carried out if, so soon as the survey of the country should be made every sixteenth section should go to the State? It was no hardship for the State to receive other lands in the place of these, which, under the treaty it would be wise and judicious should be taken by the Indians to make the reservations in contiguous and compact form.

This is the view, as I understand, which has been taken by the national Land Department in regard to the sixteenth sections by agreements between the Government and the Indians pursuant to treaty made in 1854, before the lands were surveyed, and having for one object the extinguishment of the Indian title to a large tract of country, that they must be considered as disposed of within the meaning of the enabling act of 1846, and that the State should accept other lands in their place. The Hon. Jos. A. Wilson, Commissioner of the General Land Office, writing to Hon. H. E. Paine, member of Congress from Wisconsin, on December 17th, 1870 (see letter in evidence), says:

"The sixteenth section of each of the above townships (39 & 40), except town forty (40), range seven (7) west, is embraced within the reserve, and since these lands were at the date of the reservation unsurveyed and have not been returned to the public domain or opened to disposal, as other public lands in Wisconsin, we are of the opinion that the State
64 has never acquired title to said 16th sections nor can we recognize the swamp land sections within the present limits of said reserve, for the reason that the selections were made whilst the lands were in a state of reservation from which they have not since been relieved. The same argument relates to the La Pointe band of Indians which has remained as originally reserved."

But without passing any opinion upon this question of title to the 16th sections which has been so long in dispute and is still unsettled, it has seemed to me quite clear, as this section was a part of the lands agreed upon, platted and set apart by the Government as and for a reservation and occupied so long by the Indians as such, the Government claiming it as a part of the reservation and assuming to extend its jurisdiction over it for the purpose of the control and proper management of the Indians, that for all objects of jurisdiction for the purposes indicated, the United States courts should exercise it. As a practical matter it will certainly be very embarrassing if this question of whether a crime confessedly committed within the outside limits of an Indian reservation was on this side or that side of a quarter line or some line dividing a meandered lake or stream and the surveyed land adjoining it. The Government farmer or sub-agent residing on one of these reservations owns in fee the piece of ground he occupies. There are numerous small pieces of land in the reservation belonging in fee to individuals.

The evidence also shows that there are two or three small meandered lakes in this reservation. There may also be meandered streams. These are not included in the lands selected which make up the 69, 114, 29-100 acres constituting the Lac Court Oreilles Reservation, though within the outside limits of the reservation. The general supposition has been
65 that upon the State's coming into the Union the title to the lands under this meandered water goes to the State but whether the title is in the Government or the State, suppose one Indian kill another on one of these lakes or streams, being within the outside limits of the reservation. It is within the Indian country and within the limits of the reservation. Will these courts take jurisdiction under a liberal but practical and just interpretation of the act, or must such cases be handed over to to the State tribunals with the prospect of a keen dispute about lines and titles and a clashing of jurisdictions in half the cases that shall arise? This is not, however, by any means the question the court is called upon to decide in this case, as here the land on which the crime was committed is a part of the reservation as agreed upon and platted, while the meandered lakes and small tracts belonging to individuals are not. The sixteenth section was within the "inside" as well as outside limits of the reservation. It will practically moreover, be very difficult to administer justice in criminal matters on these reservations if these fine distinctions in regard to boundaries are to prevail. These controversies will arise quite often enough if it be held that the court has jurisdiction of all cases defined in the law arising within the outer limits of the reservation, and what objection there can be to such interpretation I am unable to see. It is feasible and practical. It will subserve the ends of justice and will save embarrassment and complication.

In the case at bar the Government came into court prepared to show that the murder was committed within the outside limits of the reservation, the nearest limit one way being two miles, and the next nearest the other way three miles. The defendant had no witness who knew just where the lines ran at the place where the murder was committed.
66 But the evidence tended to show that the road where the deed was done ran across the corner of section sixteen, cutting off a small piece about three rods wide at one end and running to a point at the other

six or eight rods away. It was a road that the Indians traveled constantly leading from their village at Court Oreilles Lake to their village at Round Lake only a short distance from the scene of the murder. The country was wild and unoccupied, except that the Indians had built their wigwams there and had hunted and traveled and made their trails over and across it. I think it clear that Congress by the act of 1885 intended to give jurisdiction in such a case. And that it was within the power of Congress to do it, I entertain as little doubt. The subject matter of that statute is the government of the Indians who are the wards and under the charge and tutelage of the nation. And it is the subject matter and not the title to the land wherein the crime is committed which gives these courts jurisdiction. As there is a disagreement of opinion, the case will be certified to the Supreme Court for decision.

67 UNITED STATES OF AMERICA,
Western district of Wisconsin:

I, F. M. Stewart, clerk of the circuit court of the United States of America for the western district of Wisconsin, do hereby certify that I have compared the foregoing with the original records and proceedings in said court now remaining on file and of record in my office, and that the same is a true and correct transcript therefrom, and also a true copy of the opinions of the judges, also the question on which the disagreement hath happened which is made under the direction of the judges in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the said circuit court at my office in the city of Madison in said district this 12th day of October, in the year of our Lord one thousand eight hundred and ninety-one and of the Independence of the United States the one hundred and sixteenth.

[SEAL.] F. M. STEWART,
Clerk.

68 (Indorsed on cover:) Case No. 14916. Term No. 972. The United States, plaintiff, vs. Michel Thomas. W. Wisconsin C. C.
69 U. S. Supreme Court U. S., clerk's office. Received Oct. 15, 1891. Filed October 28, 1891.

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In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, PLAINTIFF IN error,
vs.
MICHAEL THOMAS.
} No. 972.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, PLAINTIFF IN error,
vs.
MICHAEL THOMAS. } No. 972.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

MOTION TO ADVANCE.

This case comes on a certification by Judges Gresham and Bunn of a disagreement in opinion as to the jurisdiction of the circuit court of the United States, under the *Act of March* 3, 1885 (23 Stat. L., 385) (which gives jurisdiction of offenses committed by an Indian on an Indian reservation), to try the defendant for the murder of one David Corbin, committed within the limits of the Lac Court Orielles Indian Reservation, in the State of Wisconsin. Both the defendant and his victim were reservation Indians under the charge of an agent.

The reservation named comprises within its limits several sections, numbered 16, which are claimed by the State of Wisconsin as school lands. This claim, however, has never been conceded by the Government, and the sections have always been treated by the United States as forming part of the Indian country. It was upon one of these sections that the murder was committed. It is of much importance, in the trial of other similar cases, that this question of jurisdiction should be decided.

In accordance with section 6 of the *Act of February* 6, 1889 (25 Stat. L., 656), it is respectfully moved that this case be advanced and assigned for hearing at the October term, 1893, of this court.

CHARLES H. ALDRICH,
Solicitor-General.

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Case No. 14916.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, PLAINTIFF IN ERROR,
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ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

BRIEF FOR THE UNITED STATES.

Case No. 14916.

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ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The accused, Michel Thomas, was indicted at the September term, 1890, of the district court of the United States for the western district of Wisconsin for the murder, on August 2, 1890, of one David Corbine, in the county of Sawyer, within the said western district of Wisconsin and within the limits of an Indian reservation, to wit, the Lac Court d'Oreilles Reservation.

Both Thomas and Corbine were alleged to be Indians of the Chippewa tribe of Indians, and under the superin-

tendence and control, then and there, of an Indian agent of the United States of America. The case was transferred to the circuit court. There was a verdict of guilty. A motion for a new trial was heard before the circuit judge (Gresham) and the district judge (Bunn), who have certified the question upon which they disagreed to this court for decision, under Revised Statutes, section 651.

THE QUESTION CERTIFIED.

The entry of certification is as follows:

The motion of the defendant to set aside the verdict and for a new trial, etc., came on to be argued, and was argued by the counsel for the respective parties, and upon the hearing it occurred as a question—

"Whether, as the evidence shows that the murder was committed upon section sixteen in township forty, north, of range eight west, in the State of Wisconsin, said section sixteen being within the outside limits of the said Indian reservation, and having been previously, in 1859, settled, platted, and set apart by the United States as a part and parcel of said reservation and ever after occupied by said Indians as such, though claimed and sold by the State of Wisconsin as and for a part of the school land previously ceded to said State by act of Congress; such murder was committed within the limits of said reservation within the meaning of section 9 of chapter 341 of the act of Congress approved March 3, 1885, so as to give the Federal courts jurisdiction of the offense."

On which question the opinions of the judges were opposed, which said opinions are herewith transmitted.

The court considering, as the whole case now turns upon the question of jurisdiction in this court and no proceedings can be had until that question is determined and that the same question would arise in any subsequent trial, that it is not one addressed to the discretion of the court but is proper to be certified to the Supreme Court for its opinion. Whereupon, on motion of the United States, by its attorneys and counsel, it is ordered that the point upon which the disagreement hath

> happened as herein stated under the direction of the judges, including the entire record of proceedings in court, the evidence on the trial, and statement of facts as stipulated by the attorneys herein, also copy of the said indictment be, and same hereby are, made a part of the transcript certified under the seal of this court, according to the request of the United States by its counsel, to the Supreme Court, that the matter may be finally decided.

The judges of the circuit court have sent up the entire record of the proceedings in that court, including the evidence on the trial and a so-called agreed statement of facts. But we understand that neither the evidence nor the statement can be considered on this hearing, and that the question certified must be answered, if at all, upon the facts found by the judges and stated in their certificate. (*Jewell* vs. *Knight*, 123 U. S., 426, and cases cited.) The so-called statement of facts is, furthermore, in large part a mere recital of evidence, and not a statement of ultimate facts.

IT IS NO OBJECTION THAT THE QUESTION CERTIFIED ARISES ON A MOTION FOR A NEW TRIAL, BECAUSE IT GOES TO THE JURISDICTION OF THE TRIAL COURT.

The question which is certified arose on the hearing of a motion for a new trial, but that is no reason why it should not be answered, in this case. It is true that a division of opinion on a motion to be granted or refused at the discretion of the court does not present a point which can be certified to this court under the statute; but the court will take cognizance of questions certified, where they directly affect the merits of the cause or the jurisdiction of the court, even though they arise in form on motions, such as for new trial, which are determinable

ordinarily at discretion. This is substantially the language of Chief Justice Chase in *United States* vs. *Rosenburgh* (7 Wall., 580-582). Referring further on in that opinion, page 583, to the question certified and answered in *United States* vs. *Reid and Clements* (12 How., 361), the Chief Justice said:

> It arose upon motion for a new trial, but it was plainly a point which must be determined, as of right, before sentence could be pronounced, and the certificate therefore was within the principle of *The United States* vs. *Wilson* [7 Peters, 150].

In *United States* vs. *Wilson* the question certified was whether a prisoner convicted of a capital crime could have any advantage of a pardon without bringing it judicially before the court, and it arose upon a motion of the district attorney for sentence; but this court regarded the question as going to the merits and not determinable in the exercise of mere discretion, and answered the question.

The point certified at bar presents likewise a question of right, going to the jurisdiction of the court, which must be settled before judgment can be pronounced. If this court sends the case back without answering the question, the circuit court must either overrule the motion and sentence the prisoner on the opinion of the district judge, although opposed to that of the circuit judge, or it must grant a new trial, which will simply involve another hearing without advancing the case beyond the question of jurisdiction which is now raised.

ARGUMENT.

IT DOES NOT OUST THE JURISDICTION OF THE FEDERAL COURTS, UNDER THE ACT OF MARCH 3, 1885, C. 341, SEC. 9, OVER A CRIME COMMITTED BY ONE INDIAN UPON ANOTHER WITHIN THE LIMITS OF AN INDIAN RESERVATION, WHICH WAS SETTLED, PLATTED, AND SET APART IN 1859 BY THE UNITED STATES AS A RESERVATION, AND EVER AFTER OCCUPIED BY THE INDIANS AS SUCH, TO SHOW THAT THE STATE HAD OR CLAIMED TITLE TO THE PARTICULAR SECTION OF THE RESERVATION ON WHICH THE CRIME WAS COMMITTED.

The act upon which the indictment was based, and under which the question of jurisdiction arises, is entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes." The question arises under section 9 of the act, 23 Stats., 385 which is as follows:

> That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

The *act of August 6, 1846* (c. 89, 9 Stats., 56), for the admission of Wisconsin Territory into the Union, contained the following provision (section 7):

> That the following propositions are hereby submitted to the convention which shall assemble for the purpose of forming a constitution for the State of Wisconsin, for acceptance or rejection; and if accepted by said convention, and ratified by an article in said constitution, they shall be obligatory on the United States:
>
> First. That section numbered sixteen, in every township of the public lands in said State, and, where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools.

The treaty of September 30, 1854, between the United States and the Chippewa Indians (10 Stats., 1109) contained the following provision:

> ARTICLE 2. The United States agree to set apart and withhold from sale, for the use of the Chippewas of Lake Superior, the following described tracts of lands, viz:
>
> * * * * * * *
>
> 3d. For the other Wisconsin bands a tract of land lying about Lac de Flambeau and another tract on Lac Court Oreilles, each equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President.

This was in consideration of lands ceded by the Indians to the United States.

The lands in that portion of the State were not surveyed until a year after this treaty, so that the sixteenth sections ceded by Congress had not then been fixed, and could not at the time of the treaty be identified. And if the treaty was to be carried out by giving the Indians, for their Lac Court Reservation, a single tract "equal in

extent to three townships," it is manifest that the sixteenth sections of those townships could not be reserved for the State and must be made good, under the act of cession, by "other lands equivalent thereto and as contiguous as may be."

It was considered important both for the Government and for the Indians that their reservation should be a single tract of contiguous territory. It was so laid out, and the land department has always since contended that the Government was at liberty, under the clause of the cession act referred to, to substitute other land for the sixteenth sections which it appropriated in the three townships reserved for the Lac Court d'Oreilles reservation.

It is claimed, on the other hand, that the right of the State to these sections 16 became fixed by the survey of 1855, and that the course of the United States in subsequently including the sixteenth section, on which the murder at bar was committed, in the Lac Court d'Oreilles reservation, was wrongful, although done in pursuance of a treaty between the United States and the Chippewas.

It will be observed that the question certified to this court does not undertake to settle this question of title, or to state whether the title to the sixteenth section involved is or is not in the State of Wisconsin. The statement of the question is that said sixteenth section was *claimed* by the State of Wisconsin and was sold by it under such claim, but that it was settled, platted, and set apart by the United States in 1859 as a part and parcel of the Lac Court

d'Oreilles Indian Reservation, and was in fact ever afterwards occupied by the Indians as such.

This survey and allotment of the reservation was in pursuance of the Indian appropriation act of March 3, 1857 (chap. 90, 11 Stats., 169, 183), which contained the following appropriation:

> For the expenses of surveying the boundaries of Indian reservations and of surveying, allotting, and defining Indian reserves and half-breed lands, and for other incidental expenses of carrying into effect the treaties with the Indian tribes in Michigan, and with the Chippewa Indians of the Mississippi and of Lake Superior, so far as any of the said treaties provide for the survey or allotment of lands, as set-apart reservations for the tribes or bands, in addition to former appropriation, seven thousand dollars.

The question presented to the court is, therefore, simply whether the actual setting apart of this section by the United States as and for a part of an Indian reservation established by them, and the actual occupancy by the Indians of the territory thereunder as a reservation for thirty years and more, is sufficient, under the act of March 3, 1885, to confer jurisdiction on the Federal courts of the crime of murder committed on said section, within such reservation, by one Indian upon another Indian.

The statute was before the court and its constitutionality sustained in *United States* vs. *Kagama* (118 U. S., 375). It was there assailed upon the ground that it was an attempt by Congress to extend the Federal authority, with respect to ordinary police matters, over territory lying within the jurisdiction of the States; but that was held not to be a fatal objection, and upon the ground that the subject-matter was within the Federal authority, the

subject-matter being Indians, who were said by the court to be wards of the nation, subject to its control, and not to the control of the States. Mr. Justice Miller, speaking of the act, said, page 383:

> It does not interfere with the process of the State courts within the reservation nor with the operation of State laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.
>
> It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of the local ill-feeling the people of the State where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen.
>
> * * * * * * *
>
> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

In view of this statement of the grounds upon which the constitutional authority of Congress to pass the act rests, it must be admitted that its authority would extend to Indians in their tribal state, without reference to the ownership of the lands occupied by them, and although

such lands might belong to a State or to private persons. The question at bar is not, therefore, one of Congressional power but of Congressional intention.

When Congress, by the act of 1885, gave jurisdiction to the Federal courts over crimes committed by Indians on all Indian reservations within all the States, did it mean to exclude crimes committed on the three sixteenth sections included within the Lac Court d'Oreilles Reservation, because, forsooth, there was an unsettled dispute as to whether the United States in laying out that reservation, in 1859, had the right to include any sixteenth section within its bounds? Or did Congress mean to include the Lac Court d'Oreilles Reservation, and the whole of it, just as it had been laid out twenty-six years before, and as it had ever since been occupied and used?

It was an Indian reservation—that is, land reserved by the Government for the Indians—and, therefore, within the terms of the act; and every reason for the law applied as forcibly to it as to any other reservation, because there was to be found there, within boundaries fixed by the United States, Indians living in the tribal state; and it was for the government and protection of all such that Congress sought to provide. The actual title to the territory, or to any part of the territory of a reservation is, we submit, a wholly immaterial consideration in determining the jurisdiction of a Federal court under the act in question.

The jurisdiction of the Federal courts over all the rest of the Lac Court d'Oreilles reservation is not denied. The precise point claimed by the prisoner is that, whenever it can be

shown that a crime within that reservation was committed on a sixteenth section, the jurisdiction of the Federal courts is ousted.

In *United States* vs. *Kagama* (118 U. S., 375, 384) Mr. Justice Miller said:

> In the case of *Worcester* vs. *The State of Georgia* (6 Pet., 515), it was held that, *though the Indians had by treaty sold their land within that State*, and agreed to remove away, which they had failed to do, the State could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the State and the process of its courts.

From which it appears that the exclusive jurisdiction of the Federal Government over the Indians has never been regarded as dependent upon the title to the territory occupied by them within the States.

In *Benson* vs. *United States* (146 U. S., 325), Benson was indicted in the circuit court of the United States for the district of Kansas for a murder alleged to have been committed at the Fort Leavenworth Military Reservation, within that district and within the exclusive jurisdiction, of the United States. The State of Kansas had passed an act ceding jurisdiction to the United States over the territory of Fort Leavenworth Military Reservation, and it was contended that the crime was not committed within the jurisdiction of the United States, because the particular part of the reservation on which the crime was committed was used solely for farming purposes. That ob-

jection was thus answered by Mr. Justice Brewer, page 331:

> But in matters of that kind the courts follow the action of the political department of the Government. The entire tract had been legally reserved for military purposes. (*United States* v. *Stone*, 2 Wall., 525, 537.) The character and purposes of its occupation having been officially and legally established by that branch of the Government which has control over such matters, it is not open to the courts, on a question of jurisdiction, to inquire what may be the actual uses to which any portion of the reserve is temporarily put. There was, therefore, jurisdiction in the circuit court; and the first contention of plaintiff in error must be overruled.

I respectfully submit that the question certified should be answered in favor of the jurisdiction of the circuit court.

LAWRENCE MAXWELL, JR.,
Solicitor-General.

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CASE No. 14916.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
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} No. 668.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

ADDITIONAL BRIEF FOR THE UNITED STATES.

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ADDITIONAL BRIEF FOR THE UNITED STATES.

The facts in this case are sufficiently stated in the opinions of Judges Gresham and Bunn in 47 Federal Rep., 488.

Two questions are involved:

1. Is the right of present use and occupancy of sections numbered 16, situated within the limits of Indian reservations in Wisconsin, in the Federal Government or in the State?

2. Regardless of the determination of the preceding question does chap. 341 of the act of 1885 (23 Statutes,

385) confer upon the U. S. court jurisdiction to try an Indian for murder committed by him on a section numbered 16 in the Lac Court Oreilles Indian Reservation in Wisconsin?

The first question is much the more important. Aside from the fact that its adjudication in this case favorable to the United States would probably be conclusive, there are involved considerable monetary interests and matters which have long been in dispute between the Executive Departments of the Nation and the State.

I.

RIGHT TO THE USE AND OCCUPANCY.

These reservations are embraced in the country described in the treaty made with the Chippewas of Wisconsin and the Lake Superior region generally, October 4, 1842, and proclaimed March 28, 1843. 7 Stat., 591; 1873, Revision of Indian Treaties, 217.

Under this treaty, article 2, the Indians stipulated "for the right of hunting on the ceded territory with the *other usual privileges of occupancy*, until required to remove by the President of the United States, and that the laws of the United States should be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress."

By article 5 of the treaty it was conceded that the lands dealt with had always theretofore belonged in common to the Chippewa Indians.

They have never been removed from any of the lands

embraced in these reservations. Their occupancy of these reserves has never ceased. The President did not require them to remove and no Executive order looking to their removal has ever been made.

By the subsequent treaty of September 30, 1854 (10 Stats., 1109), whereby the Chippewas ceded a large portion of their territory in Northern Wisconsin and elsewhere, provision was made for the establishment of permanent reservations for their benefit, among which was to be such a tract of land as is now comprised by the La Court Oreilles Reservation. This was to be equal in extent to three full townships, the boundaries of which should be thereafter agreed upon or fixed under the direction of the President. No reservation of the sixteenth section in any of these townships from the operation of the treaty was made, and the contract with the Indians was clearly to the effect that the townships were to be whole townships. It certainly can not be claimed by implication or otherwise that the treaty could have been in any sense conformed with by afterward constituting this permanent reservation of townships, in the center of each of which there should be a tract of land a mile square, upon which the white people could make entry, build villages and places for the sale of all kinds of merchandise, and which might plant in every part of the reservation a community hostile to the Indians and of a character necessarily prejudicial to their well-being, and from contact with which the reservation had really been formed to protect them.

When the townships forming this reservation were

afterwards surveyed these lands were certainly already "otherwise disposed of" in the sense of section seven of the Enabling Act of 1846. (9 Stats., 56, c. 89.) Moreover, by this treaty provision was made for allotting the reservation land in severalty among the Indians, and the sixteenth section was as much included and specified for allotment as any other section in the township.

In order to interpret the treaty fairly all of the executive acts looking to the establishment of the reserve should be treated as one continuous whole, performed under the direction of the President.

It is the established rule of all departments of the Government that as the United States possess the fee, subject to the right of Indian occupancy and allotment in severalty, the school grants to the various States may ultimately attach free from all incumbrance, in the event of the extinguishment of the Indian reserves by governmental authority; and that the States may either wait until the fee and right of possession be joined, or may take indemnity in view of the incumbrance.

"A territory of country with definite boundaries set apart by the Government for the use of Indians, unlimited as to time of occupancy, etc., is a permanent Indian reservation. Fee simple title is not necessary."

(Sioux and Winnebago Indian Res., Copp's Public Land Laws, 1890, Vol. 2, p. 1155.)

In *Beecher* vs. *Wetherby*, 95 U. S., 517, the status of section 16 within an Indian reservation in Wisconsin was considered, and it was held that the right of the State is subject to the right of Indian occupancy; and further,

that what right the State might have did not vest until survey.

Mr. Justice Field said (page 525):

> But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy could only be interfered with or determined by the United States.

In *Veeder* vs. *Guppy*, 3 Wis., 502, it was held that the Indian title to certain lands granted was not extinguished by an act of the State, that the power to extinguish such title was vested in the Government of the United States, and that the relations of the United States to Indian tribes is of a political character, and their rights growing out of occupancy of the soil can not be brought into question except by the United States.

In *United States* vs. *Cook*, 19 Wall, 593, it is said, that the right of the Indians to their reserved lands is only a right of occupancy, but is as sacred as the right of the Government or its grantee to the fee. The tribe is in the position of a tenant for life, and so long as it exists has complete right to undisturbed possession. See *Shepard* vs. *N. W. Life Ins. Co.*, 40 Fed. Rep., 351.

In *Heydenfeldt* vs. *Dancy Gold, etc. Co.*, 93 U. S., 634, it was held, that the right of the United States to control or incumber sections 16, previously granted by a general act for State school purposes, is absolutely in the United States until a survey has been made. Concerning the grant to Nevada of school lands, which is in the identical language

of the grant to Wisconsin made by section 7 of the Enabling Act of 1846, the court says, p. 638:

> Her people were not interested in getting the identical sections 16 and 36 in every township. Indeed it could not be known until after a survey where they would fall, and a grant of quantity put her in as good a condition as the other States which had received the benefit of this bounty. A grant operating at once and attaching prior to the surveys by the United States would deprive Congress of the power of disposing of any part of the lands in Nevada until they were segregated from those granted.

Consequently the court held that the words of present grant are restricted by the words of qualification intended to protect the State against loss through any subsequent disposition by the United States of a part of the public domain.

The opinion of Secretary Lamar, found in title State of Colorado, 6 L. D., 412, 418, treats of this question. In this and other decisions of the Interior Department it is held that the right of the United States to dispose of such lands exists until the State has made selection or disposed of them. Among other observations pertinent to the case at bar, Mr. Lamar says, p. 418:

"I think, however, the true theory of the school grant is this: That where the fee is in the United States at the date of survey and the land is so incumbered that full and complete title and right of possession can not then vest in the State, the State may, if it so desires, elect to take equivalent lands in fulfillment of the compact, or it may wait until the right and title of possession unite in the Government, and then satisfy its grant by taking the lands specifically granted. I think this view is fully sustained by the deci-

sions of the courts and the opinions of the attorneys-general. See *Cooper* vs. *Roberts*, 18 How., 173; 3 Op., 56; 8 Op., 255; 9 Op., 346; 16 Op., 430; *Ham* vs. *Missouri*, 18 How., 126."

See also Grande Ronde and Siletz Indian Reservation, 16 Copp's L. O., 152, letter of Acting Secretary of the Interior to the Commissioner of Indian Affairs, November 11, 1890, concurring in the opinion of Assistant Attorney-General Shields, November 10, 1890, not reported.

II.

QUESTION OF JURISDICTION REGARDLESS OF TITLE.

Independently of the question of title involved in this case the United States has jurisdiction.

Especial attention is invited to the opinion of Judge Bunn in the circuit court. It is very carefully prepared and an able and full presentation of the law. As the opinion of a sound and scholarly lawyer of many years' judicial experience, largely in this class of cases, it is entitled to great weight. As the judge who presided over this trial and heard the argument of counsel then made upon this question, and afterwards gave them renewed consideration when the argument upon this question of jurisdiction was made before him and Judge Gresham, he was enabled to give every point of the case full consideration. Every line and sentence in it is worthy of careful attention, and excepting that a few additional cases can be cited as authority for his conclusions, no better brief or argument can be made. The only part of Judge Gresh-

am's opinion which relates to the question ot jurisdiction, independently of a mere matter of title, is as follows: "A fair interpretation of the last clause of the statute (23 Stats., 385) shows that Congress intended to confer jurisdiction on the Federal courts to punish Indians who committed the specified offense upon an Indian reservation in a State; that is, upon lands belonging to the United States within a State and occupied by Indians as a reservation. The court has no jurisdiction of the offense."

No argument is attempted or authority shown for this conclusion, and it is difficult to perceive how an argument could be made in support of it, based upon a fair interpretation of the statute. After specifying the crimes made punishable under the act, the statute reads:

> And all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

This wording would seem to show that jurisdiction is not conferred upon the ground of exclusive territorial jurisdiction. The provision is, that the *laws, manner of trial, and punishment shall be the same* as in places where the United States has exclusive jurisdiction, obviously in terms recognizing the fact that the United States has not exclusive territorial jurisdiction, even under this statute, over Indian reservations, and that therefore the jurisdiction conferred is not that kind of jurisdiction which exists in the case of forts and arsenals upon the ground of ownership of terri-

tory. The United States never has had and has not now exclusive jurisdiction over any part of this Indian reservation. For the punishment of all offenses not specified in the act of 1885, jurisdiction to punish offenders is confined to the tribe or the State, and is constantly exercised by the latter.

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